Edmund Wade Esq
with the respects
of
the Author

AN

Ed. Wade
Feb 26. 1863.

UNDELIVERED SPEECH

ON

EXECUTIVE ARRESTS.

PHILADELPHIA:

1862.

AN

UNDELIVERED SPEECH

ON

EXECUTIVE ARRESTS.

PHILADELPHIA

1862.

TO THE READER.

There was made, in this city, on Tuesday, the twenty-third of September last, Mr. JOHN H. COOK, a teller in the bank of Kensington, being the victim, one of those audacious arrests which have caused so much public and private indignation. The writer of these pages was applied to, with other counsel, to sue in his behalf out of the District Court of the United States, for the Eastern District of Pennsylvania, a writ of *habeas corpus*, which was obtained, and the prisoner brought before Mr. Justice Cadwalader for hearing, when, after one or two postponements at the instance of the Government, they relaxed their grasp and let Mr. Cook go, no reason being assigned for his discharge, as none had been given for his arrest; and the case there ended. What had fallen from the Bench made it plain enough that the learned Judge intended the question of these Executive seizures to undergo a full examination, and should the conclusion have been to the contrary of their legality—of which it would be scandalous to doubt—all knew that the mandate of that court would have been issued as unhesitatingly against high authority as against the poorest citizen; and once issued, that it would have been maintained without flinching. Under these circumstances it was that the heart of conscience-stricken power cowered. To avoid the humiliation of disgraceful defeat, and the embarrassments arising from a decision of

a judicial tribunal of the highest character, that these arrests were made at the peril of life and property of those who ventured on them, the talons of Mr. Stanton were loosed from the body of Mr. Cook. The last attendance before the court was, in order, as Mr. Cook's counsel supposed, to the argument of the merits of the case. The learned Judge had at one of our former attendances suggested three points for consideration:

"FIRST—Whether a person who is not in the military service of "the government, and is not in a place where hostilities are actually "pending or threatened, and is not a place in military occupation, is "liable to military arrest in a district in which the Courts of ordinary "civil and criminal jurisdiction are open for the regular administration "of justice.

"SECOND—Whether the third section of the act of the 6th of Au-"gust, 1861, legalizing and making valid all the acts, proclamations "and orders of the President after the 4th of March, 1861, applies "to his acts, proclamations and orders of a similar character made after "the enactment of that law; and if not, whether any other act of "Congress has expressly or impliedly authorized the proclamation in "question.

"THIRD—Whether the President has the authority without or independent of any statutary authorization."

The arrest was to be justified, either under the President's proclamation, of the 24th September, 1862, or under a somewhat similar paper issued from the War Department the 8th of August previous.

The order of Mr. Secretary Stanton ran thus:

"ORDERED—*First*—That all United States Marshals, and superin-"tendents and chiefs of police of any town, city or district, be, and "they are hereby authorized and directed to arrest and imprison "any person or persons who may be engaged, by any act of speech or "writing, in discouraging volunteer enlistments, or in any way giving "aid and comfort to the enemy, or any other disloyal practice against "the United States.

"*Second*—That immediate report be made to Major L. C. Twiner, "Judge Advocate, in order that such persons may be tried before a "Military Commission.

"*Third*—That the expenses of such arrest and imprisonment will "be certified to the Chief Clerk of the War Department for settlement "and payment.

EDWIN M. STANTON,
Secretary of War."

The proclamation of the President was in these words:

By the President of the United States of America.

A PROCLAMATION.

Whereas, It has become necessary to call into service not only volunteers but also portions of the militia of the States by draft, in order to suppress the insurrection existing in the United States, and disloyal parties are not adequately restrained by the ordinary processes of law from hindering this measure, and from giving aid and comfort in various ways to the insurrection.

Now therefore be it ordered, *First*—That during the existing insurrection, and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting the militia drafts, or guilty of disloyal practices, affording aid and comfort to the rebellion against the authority of the United States, shall be subject to martial law and liable to trial and punishment by courts martial or military commission.

Second.—That the writ of *habeas corpus* is suspended in respect to all persons arrested or who are now or may hereafter, during the rebellion, be imprisoned in any fort, camp, arsenal, military prison or other place of confinement by any military authority, or by the sentence of any court martial or military commission.

In witness whereof I have hereunto set my hand, and caused the seal of the United States to be affixed.

[L. S.] ABRAHAM LINCOLN.

Done at the city of Washington, this the twenty-fourth day of September, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

WM. H. SEWARD,
Secretary of State.

By the President.

For the discussion of the points suggested from the bench and of the questions generally arising under the President's proclamation, the order of the Secretary of War, and the course of recent Executive action, preparation had been made, as well as the briefness of the period from the employment of counsel to the time fixed for the hearing permitted.

The paper now printed began as nothing but a few loose memoranda penned in examining books which were thought to bear upon the case. They are given to the public in their

present very enlarged form (and with a political cast which, before a court of justice, would, of course, have been inadmissible), because the interest in the subject, one which has strongly agitated the public mind, has been revived by recent proceedings in Congress, and the approaching session of the legislature of Pennsylvania; and moreover because it is believed that the most insignificant contribution towards dissipating the abominable heresies of the administration, first given to the country in the opinion of their Attorney General, will be received with a degree of favor by every American who values his freedom and is capable of abhorring schemes laid for its destruction. Things have changed since the 23d September. The day is come when men lift their heads again, when the country wonders to see what they have submitted to, when, whilst they visit with their contempt the more than one judicial character, who untrue to his station and himself basely abandoned his function in the hour of its trial, hearts swell with gratitude as they turn to those judges who stood firm and did their duty—who did not fly to shelter their own heads from the storm and leave the Constitution in a ditch.

The people of the United States, now fairly awake, perceive, and they are about to act upon it, what the question is, which is before them. Centralized power is the insolent demand of the abolition party, liberty and the rights of the States is the cry of the people; and we shall see which is to prevail.

CHARLES INGERSOLL.

Philadelphia, December, 1862.

SPEECH, &C.

I proceed, sir, to the discussion of the grave and momentous question now in full view under the points to which the attention of counsel has been directed from the bench. But let me be pardoned if I say that my colleagues and myself, are, as counsel in a court of justice, in a new and strange position in examining them; for neither our client nor ourselves have seen the warrant under which the relator was taken, nor have we the slightest knowledge of the contents of the affidavits which are understood to have been made against him. He is a teller in one of the banks, and was called aside from his desk and arrested in the midst of the morning's business by two persons who informed him they acted by orders from Washington, and there his information and our own ends. Dark and summary justice this! It is due to Mr. Cook that his counsel should assure the Court, thus without papers and proofs on either side, that on looking carefully back upon his conduct and language, at their request, and for their information, in order to his defence, he is utterly unable to furnish them with any assignable motive for this violence. He has done nothing, said nothing, and attributes his arrest to private malice. But whatever the mystery that attends the question of the cause of offence which Mr. Cook has given, there is none as to the fact, which is the subject to which our notice has been directed by the Court,—that it is under Executive authority

he was taken, and is now held. He is in custody by warrant of no committing magistrate. He is deprived of his liberty by order of the Executive, and is about to be carried out of your jurisdiction, sir, and beyond the reach of any civil tribunal, unless your writ shall prevail for his relief. Fifteen months ago when this tremendous pressure was first applied, there was no proclamation of it—its exercise was unannounced—the arrests were silently made through heads of departments—the man or woman was seized and imprisoned, and it was supposed, (but that was conjecture, unsupported by authority,) that the same power that seized the citizen and took away his liberty, professed to have suspended the *habeas corpus*. Be that as it may, persons disappeared from time to time, from their homes, and were first heard of in distant prisons, where they still remain. But it was not then pretended to push Executive power to the point of trying and punishing the prisoner. He only remained in confinement *without bail or trial*, which is the understood badge of the suspension of the *habeas corpus* act. But more came with the 8th of August, 1862. On that day appeared an official paper from the Secretary of War, by which was gazetted the suspension of the *habeas corpus*, which delegated to officials, almost without number, the power of arrest; which created the new offence of "disloyal practices," and suspended the courts of justice of the country, handing over prisoners to be tried by Military Commission. By this order it is directed that these seizures be effected by any of the Marshals of the United States, of whom, of course, there are one or more in each State, and by any "Superintendents and Chiefs of Police of any town, city or district," of whom there must be tens of thousands—for any act or "speech or writing," which these individuals might look upon as "discouraging volunteer enlistments, "or, in any way, giving aid or comfort to the enemy;" or "for any other disloyal practice against the United States;" that the writ of *habeas corpus* is "suspended in respect to

"all persons arrested and detained and in respect to all "persons arrested for disloyal practices;" that report of arrests be forwarded to Washington, "in order that such "persons may be tried before a 'Military Commission;'" and finally, "that the expense of the arrest and imprison- "ment should be certified to the chief clerk of the War "Department, for settlement and payment." Thus the *habeas corpus* is formally suspended; its suspension warrants the arrest of the citizen, not merely by great ministers of State, but at the discretion of the police, including village constables, in all parts of the country, who are encouraged to spy into the affairs of their neighbors, and should they deem their "speech," "act," or "writing" "disloyal," to arrest and carry them to Washington for trial by Military Commission.

From the 8th of August to the 24th of September the country remained under the order of the War Department of the first of those dates, but on the 24th September the wheel of power makes a turn more, the President himself appears in a proclamation, by which "ordinary processes of law" are declared to be insufficient to the present exigencies of Executive authority, and he orders a suspension of the *habeas corpus*, and declares martial law. When the Secretary of War, saying he suspended, or somebody for him had suspended, the *habeas corpus*, arrests a citizen and hands him over to be tried by a military commission, that is martial law; but he did not call it so. The President gives things their names. He resolves all doubt, and proclaims the *habeas corpus* act suspended. He does not say that those "guilty of disloyal practices" shall be arrested and tried before a military commission and leave the rest to implication. He says they "shall be subject to martial law," and closes the chapter.

Sir, in a Court of Justice, denunciation, which is cheap anywhere, is altogether valueless. It would be vain, here,

to inveigh against this Proclamation. What is to be done is to show, not that it is atrocious, but that it is unauthorized. A respectable people once cancelled, voluntarily, their somewhat free institutions, and established a despotism, placing themselves in the uncontrolled keeping of the Sovereign. Have we done so? Can the President suspend the *habeas corpus* act? Can he declare martial law? Can those measures be insisted on? Can the judiciary be required to lend their aid to them? That is the question on which the discharge of Mr. Cook depends, and I proceed to its examination.

The Constitution of the United States has been generally thought to be levelled to the intelligence of any educated mind. Every pains was taken to make it so. It is as perspicuous as consists with brevity, its language is popular, its arrangement and order seem perfect. It was written to be understood by everybody; to be laid before the whole population of the country for their approval and ratification. To leave the States to doubt and pause on its meaning was to hand it over to swift condemnation. If, to the jealousy which everywhere abounded of any central power at all, which diminished their sovereignty, was added the hesitation, which must attend the adoption of a charter, the meaning of which was not clear, the way was barred and bolted against all chance of obtaining the votes of the nine States required to organize a government under it. As all may see, in the debates of the State Conventions, it was upon the attempt to force doubt on clauses, where there was not room for it, more than upon objections to those the meaning of which was past cavil, that the opposition to the Constitution turned. If its provisions were obscure, the paper had no more chance than if they were wrong. Doubts were traitors at that day, and the framers of the Constitution exhausted their ingenuity so to convey their work to the people that it should be intelligible; that its meaning should not be the subject of speculation; and

in the *habeas corpus* clause, at least, they succeeded so well that, of the millions and millions of readers, students, and expounders of it, from the era of the Constitution, 1787, to that of Mr. Lincoln, 1861, not a doubt arose, no eye ever saw in the clause material for one.

I take up first the *habeas corpus* question, and I will endeavor to show by the *order of subjects*, which is itself a law, that to doubt, it is by Congress and not the Executive, that the *habeas corpus* is to be suspended, "when in case of rebellion or invasion the public safety may require it," only because after the word "suspended" are not written the words *by the Congress*, is to deny to the Constitution the element of order, and throw the whole paper into confusion. If order is to go for nothing, and the fact that the suspending clause is found under the legislative head, among legislative powers and restrictions, be of no avail, then the Constitution ought to be recast from beginning to end. If a law may be suspended—and to suspend a law is to legislate—by one branch of the government, as well as by another, unless the power over that law be in so many words given to one, and in so many words denied to the others—if such be our Constitution—then it may be safely said that it is a very confused production.

Now, if ORDER be the first law, let us see what part it plays in the Constitution of the United States.

The members of the Convention of 1787 laid their work before the people, divided into seven distinct and separate articles, subdivided into sections. To the first article belongs the subject of the legislature, to the second the executive, to the third the judiciary, to the fifth the subject of amendments of the Constitution, to the seventh that of the ratification of it by the States. The fourth and sixth articles, which are sometimes in the books entitled miscellaneous, comprise matter not capable of being articled under the heads of legislative, executive, judiciary, amendments and ratification, such as that which declares that "full

"faith and credit shall be given in each State to the acts, "records and judicial proceedings of every other State;" that "all debts, contracts and engagements entered into "before the adoption of the constitution shall be as valid "against the United States under the Constitution, as under "the Confederation," and other miscellaneous provisions, in all seven in number. The separation of subjects is thorough. The three great departments of government are confined to their several articles, 1st, 2d, 3d, and kept as distinct, one from the other, as language and ideas will admit; so are the subjects of articles 5th and 7th, that of amendments to the Constitution, and that of the ratification of it. Of the miscellaneous matter comprised in articles 4th and 6th, it may properly be said that which is contained in article 4th refers itself rather to the States than the Union, and that of article 6th rather to the Union than the States.

The force of classification could go no further. In bestowing and defining the functions of a government composed of three departments, one of which is to make the laws, another to execute them, and the third to administer justice, it is of course not possible in describing one to omit all mention of the other two, which are to unite in action with it. Therefore under the legislative article the Executive and Judiciary are not unmentioned, and in those of the Executive and Judiciary the other branches are heard of; but incidentally only, and incidentally to the description of the functions of that department to which the article is devoted. Disorder never creeps in. For example, to an act of the Legislature the Executive puts his name. Incidentally therefore to the organization and establishment of the Legislature by article 1st the President appears. Again, to make a President and Vice President of the United States, in the event of the electors not casting a majority of votes in favor of any one candidate, the two houses of the Legislature come in, and elect them. Inci-

dentally therefore to the organization and establishment of the Executive by article 2d, the Legislature appears. But so absolute is the separation of subjects, and so rigorously is pursued the rule of bestowing all powers, fixing all limits, assigning all duties to each department under its own proper head, before proceeding to the next, that in the legislative article to which are given half of all the sentences in which the Constitution is written, the Executive office is alluded to three times only. It appears when provision is made for the choice of the presiding officer of the Senate, in the event of the Vice President being called to exercise the office of President: it appears again in the provision that the Chief Justice, and not the Vice President, shall preside in the Senate in the event of the impeachment and trial of the President; and also in the provision that bills passed by Congress are to be presented to the President for his approval or disapproval. In those three cases is the President heard of in the legislative article; and unless it be true that the *habeas corpus* clause gives to him and not Congress, the suspending power, he is not elsewhere known in the article. There is the same degree of exclusive devotion to its proper subject, with the same sort of incidental, but incidental only, introduction of other subjects, in the other two articles. If the Legislative appear in the Executive article, it is incidental, as, where in article 2d, it is ordered that the electors of the President and Vice President transmit their votes to the seat of government, to be opened by the President of the Senate in the presence of Congress, who, should the electors fail to make a choice, choose a President and Vice President, the House choosing the President, and the Senate the Vice President. If the Judiciary appear in the Executive article, it is incidental, as, where in article 2d it is ordered that the judges be nominated by the President.

I invite counsel to show the Court a single case where in the Legislative article an Executive function, attribute or

power, or any thing pertaining either to the Executive or Judiciary is to be found, excepting only in the manner I have stated. Certainly if the Executive be a President and Vice President, and the Legislature a Congress, and in a given event Congress are to choose a President and Vice President, the Executive and Legislative must e'en go, for the occasion, into the same article. It might be the Legislative article or the Executive article, but it must be one of them. But let counsel show where the framers of the Constitution have taken purely Executive matter and thrown it into article 1st, or matter purely Legislative and put it into article 2d; let him show where they have been arbitrary, careless or indifferent. If in article 1st, among the powers of Congress or the restrictions of them, we have in the *habeas corpus* clause, a function, not of Congress but the President, it is the only matter out of place in the whole instrument. It is the only function not carefully assigned to its proper article and section. Moreover, it is a faculty only less important than that of declaring war or raising money, left to be attributed to the Executive, Legislative or Judiciary, as circumstances might direct.

I come, now, to consider in detail article 1st, that which contains the *habeas corpus* clause. I propose taking up the contents of this article, section by section, to show, by an examination of them, that the article is a purely legislative article, and contains nothing but what goes to the organization of that department; and, above all, that no power is anywhere conferred on the President, except that which I have mentioned of signing or refusing his signature to bills. The article comprises ten sections.

The 1st declares that the legislative power shall be vested in a Senate, and House of Representatives.

The 2nd concerns the House and, clause by clause, provides for its composition, the term of service, age and qualifications of members, the qualification of electors, the apportionment and basis of representation, the filling of va-

cancies, the power to choose officers, and the impeaching power.

The 3d concerns the Senate, and, clause by clause, provides for its composition, the term of service of members, their election, their classification in order to a third of them going out every second year, for the filling of vacancies, the age and qualification of senators, for the Vice-President's presiding with no vote but the casting vote, for the power to choose officers, the power to try impeachments, and their organization and sentence in impeachment cases.

The 4th concerns both Senate and House, in two clauses makes certain provisions for the time of the meeting of Congress, and the rights of the States, as regards the election of members.

The 5th concerns both Senate and House, and in four clauses provides for their being judges of the elections, returns and qualifications of their own members, for the quorum, the attendance of members, and their conduct, for the journals, and the yeas and nays, and touching the right of either House to adjourn without consent of the other.

The 6th concerns both Senate and House, and, in two clauses, provides for the compensation and immunities of members, and against their appointment to or holding place under the United States.

The 7th concerns both Senate and House, and, in three clauses, provides specially for the case of revenue bills, and, in the case of all bills, orders, resolutions or votes requiring the concurrence of the two Houses, gives the President his qualified veto.

Thus we have what may be called the composition, organization and mode of action of the two Houses of the legislature presented in these seven sections of the first article. So far it is plain there is no matter in the legislative article that is not legislative; nothing preparatory, or introductory to this stupendous claim of the President in the

remotest degree, nothing which lays the ground for it. How is it with the rest of the article?

The remaining three sections are devoted, the 1st to conferring on the legislative body thus established its various powers, the 2nd to imposing on the legislative body certain restrictions, and the 3d to tying the hands of the States by restricting them from action which would embarrass that of the legislative body. The first of these three last sections is the eighth. Having premised, "The Congress shall have power" it proceeds in eighteen clauses, to enumerate the powers of that body, seventeen of which are specific, and the eighteenth more general, being "To make all laws "which shall be necessary and proper for carrying into exe- "cution the foregoing powers and all other powers vested "by this constitution in the Government of the United "States or any department or office thereof." Each of these powers is a power of Congress, certainly not of the President. The next two sections of the first article, sections nine and ten, I have said are both restrictive, section nine on Congress, section ten on the States.

They are restrictive in letter as well as spirit. Of the seven clauses of section nine, five begin with "No." *No* bill of attainder shall be passed. *No* title of nobility shall be granted, and so with the others. The remaining two clauses, which do not begin with the simplest word of negation in the language, are however equally restrictive with those which do. The migration or importation of certain persons shall *not* be prohibited. The privilege of the writ shall *not* be suspended.

Of the two clauses of the next section, section ten, both begin with "No." *No* state shall enter into a treaty. *No* state shall lay imposts or duties on tonnage without consent of Congress.

I have said that section ten, which I take up before section nine, consists of certain restrictions on the States in-

tended to prevent their embarrassing the action of Congress. I read section 10th:

"1. No State shall enter into any treaty, alliance, or confederation; "grant letters of marque and reprisal; coin money; emit bills of credit; "make anything but gold and silver coin a tender in payment of "debts; pass any bill of attainder, *ex post facto* law, or law impairing "the obligation of contracts; or grant any title of nobility.

"2. No State shall, without the consent of Congress, lay any im- "posts or duties on imports or exports, except what may be absolutely "necessary for executing its inspection laws; and the net produce of "all duties and imposts laid by any State on imports or exports shall "be for the use of the treasury of the United States, and all such laws "shall be subject to the revision and control of Congress. No State "shall without the consent of Congress, lay any duty on tonnage, "keep troops or ships of war in time of peace, enter into any agree- "ment or compact with another State, or with a foreign power, or "engage in war unless actually invaded, or in such imminent danger "as will not admit of delay."

Having thus given its language verbatim, it is perceived that, of these restrictions on State power, six touch specifically named powers of Congress. They are the powers:— 1. To grant letters of marque and reprisal; 2. To coin money; 3. To lay imposts and duties on imports and exports; 4. To lay duties on tonnage; 5. To keep troops or ships of war in time of peace; 6. To engage in war. Each of these six functions being conferred on Congress, the restriction on the States makes it either exclusively a power of the Federal Legislature, or a power to be exercised by a State only with the consent of Congress, and subject to their revision and control.

It is obvious that these six powers must needs be subject to their control, or exclusive, to be powers at all. Congress would in effect, not possess the power of war and peace, if a State, at its pleasure, could arm, or grant letters of marque when peace was the Federal policy, or could make peace when Congress declared war; nor of coining money, if it were in the power of a State to establish a standard of value of its own; nor to regulate commerce and impose duties, if at the ports of every State there were a different tariff. These are re-

strictions on the States in order to Federal legislation. Certain powers being conferred on Congress, corresponding State restrictions prevent their being interfered with.

There are next in the 10th section, three restraints which are laid on Congress and the States alike, forbidding attainders, *ex post facto* laws and titles of nobility. There would be little use of preventing the Federal government violating these rules of justice or policy if the States could do it. To give effect to these three restrictions, to make the law of Congress what such restraints intend it should be, they are laid also on the States.

I now come to the other State restrictions. They are five in number, and contained, I have already said, in the 10th section. They do not, like the other six, cover powers of Congress, which can be said to be specifically named or referred to, but they are restrictions on State power which are necessary to Federal legislation. Nor are they like the other three, inhibitions alike on Congress and the States. These five forbid a State—To enter into any treaty, alliance or confederation; to emit bills of credit; to make anything but gold and silver coin a legal tender in payment of debts; to pass any law impairing the obligation of contracts; to enter without the consent of Congress into any agreement or compact with another State or with a foreign power.

If a State could enter into treaty, alliance or confederation, or enter into any agreement or compact with a foreign power, without the consent of Congress, the eleventh of the eighteen powers conferred on them, that of war and peace, would be taken up by the roots, and not one of the remaining seventeen but would be impaired. The denial to States of authority to emit bills of credit or make a legal tender of any commodity but gold and silver, or to violate contracts, is indispensable to the exercise by Congress of the third power, that of regulating commerce with foreign nations and among the several States, and of the fifth, that of coining money and regulating the value thereof, to say

nothing of others. Finally the denial to States of authority without the consent of Congress to enter into agreements or compacts with one another may be said to be indispensable to the exercise of any and every one of the powers of Congress. The compact to-day existing among the seceded States seems to be proof enough of that.

I submit, therefore, that of the sixteen prohibitions under which the States are laid in the tenth section, the purpose of all is to disembarrass Congress of State action to the contrary of the exercise of the eighteen powers conferred on the Federal Legislature in the same article.

The word "treaty," in the first clause of the tenth section, forbidding States to enter into treaties, especially if taken without the words immediately following, "alliance or confederation," may be thought a restriction in favor of the power of the President and Senate to make treaties, rather than of any power of both branches of Congress, if we assume that Congress is bound, when the treaty has been confirmed, to make laws to carry it out. But, not to enter upon such disputed ground, it is practically true that in no free country can the Executive, without the approbation of the representatives of the people, carry out a treaty, still less one which could be properly denominated an "alliance or confederation." In England a treaty could not be made if the minister were not able to bring a parliamentary majority to approve it. In France Mr. Rives' treaty of the 4th of July, 1831, was subject to the vote of the chambers on the appropriation required to meet its provisions. No treaty could be devised that might not require legislation for its support.

If the President and Senate made treaties independently of the House of Representatives, what would become of the power of Congress to lay imposts, to regulate commerce, to make war and peace, to establish rules of naturalization, to regulate the value of foreign coin, to define and punish piracies and offences committed on the high seas and

against the laws of nations, to support armies and navies, in fact every power of the eighteen? They are all capable of modification or abrogation by treaty with foreign nations. It is not, therefore, because the President and Senate make treaties that it can be said to be less than true that of the sixteen restrictions every one is a restriction on the power of the States, in order to the exercise of the powers of Congress. If the States could make treaties, alliances and confederations, the powers of Congress would be paralyzed; and this prohibition on the States follows in the same article the powers conferred on Congress. It is like placing the Executive power to veto bills, in the legislative article. It was equally appropriate to define and describe that power under the legislative or executive head, for it belongs to both. The restriction on States to make treaties, alliances, and confederations is appropriate to either article. It must be written down under one of them, is equally well in either and could not properly be placed in both.

I pass from the 10th to the 9th Section,—from the restrictions on the States to the restrictions on Congress. The 9th section contains seven restrictive clauses, and eleven restrictions, there being more than one to a clause, in some instances. Every clause is restrictive, and restrictive only. I do not say there may not be a grant of power in the dress of a restriction, though far from admitting it. Whether a restriction can be a grant I do not stop at this moment to enquire; but they are all in language restrictions, and not grants. I take them one by one:

"The migration or importation of such persons as any of the States "now existing shall think proper to admit, shall not be prohibited by "the Congress prior to the year one thousand eight hundred and eight, "but a tax or duty may be imposed on such importation, not exceed-"ing ten dollars for each person."

Here is a restriction on the 1st and 3d of the powers of Congress, by which having power to lay duties and regulate commerce, they might have forthwith imposed a prohibition on the importation of slaves, had they not been, by this re-

striction, restrained from total prohibition until the first of January, 1810, and in the meanwhile limited to a duty of not more than $10 a head. This then is a restriction on a power of Congress.

I pass the 2d, which is the *habeas corpus* clause, and come to the 3d.

"No bill of attainder, or ex post facto law, shall be passed."

Congress having power to punish crimes might have punished by attainder or *ex post facto* law, but here is a restriction.

The 4th Clause—

"No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

is a restriction of the first and third of the powers of Congress, to lay and collect taxes, duties and excises and to regulate commerce. But for it, and the third clause of the second section, Congress might in imposing direct taxes, favor one State at the expense of others, or reckon slaves not by the three-fifths rule.

The 5th Clause declares that—

"No tax or duty shall be laid on articles exported from any State. "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

It is plain that the three prohibitions here comprised apply to the first and third powers of Congress, which are broad enough, if not thus restricted, to enable Congress to legislate in any one or all of the the three prohibited ways.

The 6th Clause—

"No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

By the first of the powers of Congress they are authorized to raise money by taxes, by the second to borrow it, by the third to coin it. Under these and other powers the Treasury is filled. By the eleventh, twelfth and thirteenth,

they are empowered to declare war and support navies. By these and other powers the Treasury is emptied. Congress fills and empties it by virtue of the powers conferred; but by this restriction they are limited, in parting with their means to appropriations made by law; and of both receipts and expenditures accounts are to be, from time to time, published for the information of their constituents.

The obedience to this restricting clause which, to draw money from the Treasury, requires a law appropriating it, will be found in the annual appropriation bill of every session. The command enjoining the publication from time to time of a regular statement and account of the receipts and expenditures of all public money was fulfilled at the first session of Congress under the Constitution, by the 4th section of the act of the 2d September, 1789.

Thus Congress are prohibited to permit the Executive, the Judiciary, the army, the navy, to expend the public treasure in any other manner than under appropriations made for their proper objects, and made public. The Legislature is responsible for the public expenditure and cannot throw it off on the functionaries who make the outlay. In most other governments the money which is gathered from the people is appropriated by Executive power. In the United States, Congress which has the power to raise, but not to spend it, is especially prohibited to allow it to be expended by the Executive or any other department, in any other manner than in consequence of appropriation made by law, and of both its receipts and expenditure, they must see that the accounts are published.

The 7th Clause is—

"No title of nobility shall be granted by the United States, and no "person holding any office of profit or trust under them shall, without "the consent of Congress, accept of any present, emolument, office, "or title of any kind whatever, from any king, prince, or foreign "state."

Here are two distinct parts to the clause. The first forbids titles of nobility, which Congress but for the restric-

tion, might essay to confer as they do military and naval titles. The second prohibits Federal functionaries, legislative, executive and judicial, to accept office, title, present or emolument from foreign States. But for it there would be nothing unconstitutional in a member of Congress choosing to receive a pension from abroad, or a minister to a foreign court a token of politeness or regard from the prince to whom he was accredited. Under the restriction of leave first had from Congress, either present, emolument, office or title may be accepted. This could scarcely be classed among the powers of Congress, and has been put at the foot of the restrictions. It is a restriction against their permitting the silent influence of foreign gold or favor upon the Federal Government. Should we think proper to allow merit to be rewarded from abroad, it must be openly done in pursuance of act or resolution of Congress.

This brings us to the *habeas corpus* clause, the second of the 9th section, and I think I may say that the analysis of the contents of the first article warrants the conclusion that if the exception be not to be found in the *habeas corpus* clause it is not anywhere in the article, and that there is no exception in any part of it to the rule that it is an article legislative merely.

I read the *habeas corpus* clause:

"The privilege of the writ of *habeas corpus* shall not be suspend-
"ed unless when, in case of rebellion or invasion, the public safety
"may require it."

Now, what is there to make this clause an exception to to the rule—a rule otherwise universal? Here is a prodigious power, that of the President to suspend the Constitution, we are told, and that we are to look for it, not among the Executive attributes in the 2d article, but hidden and stowed away among the restrictions upon legislative power in the legislative article. The article I have examined consists of ten sections given to the organization, the powers and the restrictions of the powers of Congress. It begins with declaring that the legislative powers granted by the Consti-

tution shall be vested in the two houses,—proceeds to define the organization of each separately,—then assigns the properties, rules and privileges common to both, with no mention of the other two branches of government, unless incidentally to the description of the Federal Legislature. Then follow the powers with which Congress is endowed to carry out the objects for which it was constituted; then the restrictions of those powers intended for protecting against Federal oppression the States and citizens of States coming into the Union; and last the restrictions on State power intended for protecting Federal rights and Federal authority against State jealousies.

After the Legislature has been thus instituted, in the most clear, orderly and systematic manner the Executive institutions come, immediately following, in an article beginning:

"The Executive power shall be vested in a President of "the United States of America;" and with the same clearness of method, unmixed with other matter is defined and organized the Executive department.

And now the question is whether it is to be assumed—I say assumed—that the *habeas corpus* clause, standing among the clauses of the section of limitation of the Congressional powers, is a limitation, not of Congress, but the President; that when the President has been scarce named, and not at all except incidentally, nor his office described, there should be dropped on him, from what is pretended to be a stray clause of the legislative article, this tremendous and engulphing authority.

If such a misleading collocation of sentences figured in any mere literary work, it would be justly the subject of contemptuous criticism, but in the case of a national charter of organic law such want of precision is unaccountable and incredible. It is a fault extraordinary indeed in a production of such order and accuracy in the preparation of which we know that men of high ability, with the habit of

literary labor, took every precaution against confusion or inelegance, and in which not another such offence can be discovered. Nor should it be forgotten that before this paper in which the greatest if not the most comprehensive of the Executive powers is in danger of being lost in the legislative article, was laid before the public, it was handed over to a committee raised for the express purpose of giving the last finish to that very "arrangement" which they are now supposed to have left in this important particular so wretchedly imperfect. When we add to this that the Executive power, thus supposed to be found just where it ought not to be—is not said to be Executive—is not called so—but that, to make it a power of the President we have to supply the words *by the President*, the difficulty of believing on the face of the writing that a blunder so gross has been fallen into becomes very great. If the power was meant for the President what chance of being so understood when placed in the legislative article, without the words *by the President*, added? Found in the legislative article where the concerns of the Federal Legislature alone are in question, what so natural as that the suspending power should be attributed to Congress, though the words *by the Congress* were not used?

It was unnecessary to repeat them at each clause. In the preceding section, conferring the powers of Congress in eighteen distinct clauses, each conferring a distinct power, the word "Congress" is written but once. "The Congress shall have power," and then follow in succession eighteen sentences, all governed by those words. The case is not exactly that of the restricting section, which contains the *habeas corpus* clause, for there the clauses or sentences are not governed by the noun Congress; but they have it, for their objective case, and that is the difference between them. They resemble each other in this, that the repetition of the words *by the Congress* in the one and of *the Congress shall have power* in the other is avoided in both. In the enumeration of powers it was not neces-

sary to say *Congress shall have power* at each successive clause. In the enumeration of restrictions it was not necessary to say *by the Congress*, at each successive restriction.

The 8th section saying "The Congress shall have power" 1st to lay and collect taxes, 2d to borrow money, 3d to regulate commerce and so to the end, is clear, without repeating, at each newly named power, the words *the Congress shall have power*—the Congress shall have power 1st to lay and collect taxes, the Congress shall have power 2d to borrow money and so forth. So the 9th section is clear; it begins 1st "The migration or importation of such persons as any "of the states now existing shall think proper to admit "shall not be prohibited by Congress" and the words *by the Congress* are not repeated in any of the five succeeding clauses, but they are as clearly to be understood as part of each, as the words *the Congress shall have the power* are in the preceding section. 1st. The migration shall not be prohibited *by the Congress.* 2d. The privilege of the writ of *habeas corpus* shall not be suspended *by the Congress.* 3d. No bill of attainder shall be passed *by the Congress.* 4th. No capitation tax shall be laid *by the Congress.* 5th. No tax or duty shall be laid *by the Congress* on articles exported from any State. No preference shall be given *by the Congress* to the ports of one State over those of another. Nor shall vessels bound for one State be obliged *by the Congress* to enter, clear or pay duties in another. 6th. No money shall be drawn from the Treasury but in consequence of appropriation made by law *by the Congress.*

But as it was first a miserable blunder to let a distinct Executive power get into the Legislative article, and not less miserable, when it did get there, to omit to say in plain words that the power was a power for the President, when, otherwise, every man must suppose it was a power for Congress; so to leave, if that was intended, the exercise of this authority to be carried here or there by the currents of party, is the worst of all. What! An open question whether

the Constitution, if to be suspended, is to be suspended by the representatives of the people or by the President! Why not have left it an open question how long the President was to serve, whether for life or years, whether we were to have a single or double Executive, or any other point not more momentous than this which was turned over to be settled as it might be?

What is a Constitution for, if it is not to save us from such perils, to fix in advance the organic law, to bestow the higher and greater functions of authority in the quarters where it is deemed they most safely can be lodged, to anticipate and forestal faction, and the "priesthood of expediency," by the deliberate counsels of prudence and wisdom? It is not to be believed that the framers of the Constitution thought that to leave this question open was right. It is not to be believed that knowing it was wrong, they left it open by sheer negligence. Yet this is the alternative, if counsel mean to say that in the absence of the words *by the Congress*, in the *habeas corpus* clause of the Legislative article, the power to suspend the privilege of the writ can fairly be attributed to the Executive.

The omission was intentional or unintentional. If intentional, it was incredibly unstatesmanlike, if unintentional, it was incredibly careless. This I say is the alternative, unless he means to tell us that a paper signed George Washington, to say nothing of the other illustrious names to it, is in a material part of the terms in which it is conveyed, uncandid, insincere and deceiving, that the Convention or some of them, who were in favor of a stronger government than the States would for a moment have looked at, meant to thrust upon the people at some juncture like the present, that which never would have been consented to when they were laying, while wisdom ruled the hour, the foundations of their institutions.

But, I proceed, as if we had before us the construction, not of a constitution, but a statute, in which there is de-

tected a *casus omissus*. Let us believe that here is a *casus omissus* in the Constitution of the United States, or that for some reason, no matter what, it makes no provision which branch of the government shall suspend, what it is settled may be suspended, the privilege of the writ of *habeas corpus*.

What power can suspend the law but that which made it, the Constitution being silent and the student or the politician left to attribute a Legislative power to the proper branch of the government? Where should Legislative authority adhere, if not to the Legislature? What is the suspension of a law but the making of a law? It is but modifying, changing, altering and amending it, and who but the Legislature can do that? Here is a restriction on this law-suspending right, but the paper, they say, fails to inform us on whom the restriction is laid, and we know no more than this, that the restriction is imposed on whatever power it is which can suspend. Why place the restriction on the President? What power had he to be restricted? The *habeas corpus* if it had not been enacted by Congress in the statute of 1789 would have no vitality for the President to suspend. No such writ could be sued out of a Federal Court but for the act of Congress.

What sort of government did they give us, if those, whose duty it was, to enact this writ, and whose duty it might be to suspend it, could enact but could not suspend it? The argument must be a strange one which sets off with agreeing to the power of Congress to enact the writ, and while insisting it must be sometimes suspended, yet denies to Congress the power to enact a suspension. If suspending the *habeas corpus* were an unqualified crime against the State, under any circumstances, the argument that gives the power to make but not unmake it, might be less than absurd, but not so when the suspension is said to be as necessary as the enactment.

It is said Congress was bound in constitutional duty to pass the act, and it would have been a violation of their

duty to omit to enact it. Well, so it would be not to enact the writ of *scire facias* and the Judiciary act accordingly ordains that the courts "shall have power to issue writs of *scire facias*, *habeas corpus* and all other writs not specially provided for." The courts of the United States shall issue writs of *scire facias*, *habeas corpus* and all other writs not specially provided for by statute. This is the will of Congress. But would it be a violation of duty—that is the point, not whether it would be more or less wise—if Congress should strike *scire facias* out of the statute; if they should discountenance the credit system to an extent greater than we see in those countries where suits for debts of certain kinds which we sue for every day are excluded from courts of justice; if Congress should determine that all commodities be sold for cash, and closed the courts of the United States against *scire facias* and other writs for the recovery of demands arising out of purchases and sales?

Would it be a violation of constitutional duty if they should substitute heavy penalties against unlawful arrests as a better protection than the *habeas corpus*, and close the courts against the writ in that form? There have been free countries where there was no *habeas corpus*, where liberty was protected by other ways and means. Why, then, should it be a constitutional or moral obligation upon Congress to adopt exactly the forms of freedom thought to have been perfected in the time of 31 Charles II. and 56 George III? The writ of *habeas corpus* we are assured, is very dangerous, and needs occasional suspension; will it be said that if there were one which is never dangerous, and the use of which is always safe and consistent with good order, it might not serve our ends?

If it be true that Congress might duly have substituted for the *habeas corpus* some other remedy, and have omitted to provide for its existence at all; if between it and another writ they could choose, as between *scire facias* and some

other mode of bringing parties into court, it would seem to follow that to the branch of government to which belongs the original duty of establishing the remedy belongs also the derivative one of suspending it, if the Constitution have made no express provision to the contrary.

But let us suppose it not true that Congress, without the aid of the *habeas corpus* clause, could have suspended the writ. The clause is, as has been well said, restrictive, and not enabling; and further, as has been equally well said, nobody will pretend that, without it, the President could either make, repeal or suspend the writ. Now the argument may be sound or unsound, which thence reasons to the point that Congress had without the clause the power to make, repeal or suspend. But the reasoning cannot be unsound, if it stop short of that point, and go only the length of insisting that the framers of the Constitution must have *supposed* the power to suspend was where the power to enact was, and must have intended *by the Congress* to follow the word "suspended;" for otherwise why was the clause made restricting and not enabling? They were restricting a power which they supposed existed. It may not have existed, but they supposed it did, or why restrain it? They never supposed the President could have permanently suspended the writ of *habeas corpus*. They did not mean to restrict him.

Again the argument on the other side fails, not only because whether Congress had the actual right or not to legislate away the *habeas corpus* the framers of the Constitution thought so, but it fails also because they knew, and in that they were correct, beyond all doubt, that Congress could modify it. If they could not abolish, they could tamper with it. If they could not pass an act declaring it unnecessary to the liberty of the citizen, they could declare it to be grantable only in term time, and not in vacation, they could encumber it with delays, they could affix no penalties to refusing, denying or delaying it, they could bring it down

to the level of any other writ. This manifest control over the privilege of the writ the convention, by their restricting clause, may well have proposed to themselves to place a limit upon. They may have intended while they thought, as the argument on the other side is, that Congress could not directly do away the writ, that as they could reduce it to a shadow, the clause by which its suspension was forbidden except in given emergencies, was an useful check upon them.

Counsel have asked, where is found the power in the Constitution to suspend the *habeas corpus* outside of the *habeas corpus* clause? The argument is that, but for this clause, there could be no suspension of the writ, either by Congress, or the President: show, he says, the power which authorizes Congress to suspend it.

I answer that I find it in the eighteenth power—the last.

"To make all laws which shall be necessary and proper for carrying "into execution the foregoing powers, and all other powers vested by "this constitution in the government of the United States, or any de- "partment or officer thereof."

Of the powers bestowed on the Federal Government the more important were given to Congress—to make war, to impose taxes, to borrow money, and others, seventeen in number. The exercise of not one of these functions of sovereignty,—all of them complex operations,—could be accomplished did not this 18th power authorize also the necessary legislation to carry it through; and not one of them but might need for its protection and vindication the whole energy of the government, a suspension of the *habeas corpus* included. Does the gentleman mean to say that to warrant its suspension there must be found a power on purpose—Congress shall have power to suspend the *habeas corpus?* Let him tell us why—let him say why, beside the 18th, he wants a special power to suspend the *habeas corpus* more than to take life or liberty in punishment of crimes. I turn him, in answer to his call, to the last of the powers of Congress, submitting that by virtue of it, but for the re-

strictive clause in the 9th Section of the 1st Article, by which they are confined to cases of rebellion and invasion, they could suspend the writ whenever it was "necessary and proper for carrying into execution" any of the seventeen powers, or any "other powers vested by the Constitution in the government of the United States or any department or officer thereof."

With their extreme closeness of interpretation, niggardliness I may call it, how is it possible to carry through, even with the aid of the *habeas corpus* clause, the argument in favor of the President? He is the Executive, he neither makes nor suspends the laws, on the contrary, "shall take care that the laws be faithfully executed," and here is a clause of the Constitution—and there is nothing else to countenance his pretension—to the effect that the *habeas corpus* shall not be suspended except in time of rebellion or invasion. If the argument be open to him to take this right, why not to the judiciary, or to one of the judges, or to the Senate alone, or the House alone, or to the Vice-President, or to the Executive, Legislative and Judiciary combined. Can the Executive snap up any power, legislative or judicial, which is not distinctly and expressly designated to its proper department? "All Legislative power herein granted," says the Constitution, "shall be vested in a Congress of the United States." "The judicial power of the United States shall be vested in one Supreme Court and such inferior Courts as Congress may from time to time order and establish." "The Executive power shall be vested in a President of the United States of America." If power which is not in words delegated to its certain department, but which is not Executive, may be handed over to the Executive, that which is not judicial to the Judiciary, that which is not legislative to the Legislature, the Constitution is a chaos. To illustrate this, let me take some of the powers or functions as to which no doubt can be reasonably suggested to what department they are attributable, but not in words assigned to it.

The Senate was to be divided, on its first assembling into three classes, the seats of two, four or six years. "They shall be divided, as equally as may be, into three classes;" but it is not said by whom. Could the first President, have claimed it, as an Executive right, to assign the six years seats? "The President shall at stated times receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected." Who is to determine his compensation but Congress? Yet the Constitution does not say so; and it would be infinitely better to let him fix his own salary than suspend the *habeas corpus*. The judges of the Supreme Court shall at stated times receive a compensation for their services, but it is not declared by whom it should be fixed. Shall they settle it themselves, or shall the Executive, or shall the Legislature?

Take those clauses of the Constitution called miscellaneous, the function of carrying which out is neither Executive merely nor Legislative, nor Judicial, and which is left *sub silentio*, the Legislative portion of it to the Legislature, the Executive to the President, and the Judicial to the Courts. How should the division of their respective offices among the branches of our government be made, in such cases, if, as here insisted, the power of suspending the laws, may be given to the President, and no regard is to be paid to the constitutional provision that the legislative power is in Congress? For example: "The citizens of each State shall be "entitled to all privileges and immunities of citizens in the "several States." Persons held to service or labor in one State by the laws thereof, escaping into another, shall be given up to the party to whom such service or labor is due. The United States guarantees to each State a republican form of government. Are these provisions to be carried out as best may seem to the Executive, Legislature and Judiciary, without respect to the constitutional distribution of the powers of the government? Could the Executive or

Judiciary enact a fugitive slave law, and Congress execute it? If the republican government of a State were subverted and a monarchy established there, could the President, having called out the militia of the neighboring States, by virtue of the acts of Congress under the Constitution, proceed to set things to rights as if there were neither a Legislature nor Judiciary in existence?

When we remember that the different branches of our system are co-ordinate, that the Congress does not determine the province of the President, nor the Judiciary that of Congress, that each thinks for itself, and in its sphere is supreme; that the people, in the jealousy of their freedom, have not bestowed upon one the force to rule the rest—a force existing in all governments but ours, that neither has the right nor power to control another, and that when they jar there is none to compose their discord; when we give to this peculiarity—this delicate and dangerous peculiarity of our system—its due regard, it must be plain that the most destructive of heresies, for us, is that which goes to remove the landmarks and confuse the boundaries of Executive, Legislative and Judiciary.

I have now no more to say on the construction of the *habeas corpus* clause, as its interpretation is looked for on the face of the section containing it. Let us, having looked within the paper, now look without for the meaning of this short sentence.

"For the meaning of the term *habeas corpus* resort may unquestionably be had to the common law," said Chief Justice Marshall, in 4 Cranch 94; and why not for the meaning of the term, suspension of it? Had the phrase, to suspend the *habeas corpus*, or the suspension of the privilege of the writ of *habeas corpus*, an established meaning in 1787; and what was that meaning? What was understood by it? What was the *habeas corpus*, and what did they understand by its suspension?

One thing is very certain, that the same words put into any other than a charter of Englishmen, or those inheriting their laws and history, would have had no meaning at all. Neither *habeas corpus*, nor suspension of the writ of *habeas corpus* out of the English language, had any meaning. They were not so much as translateable words. But in the English language, and according to English law and history, they were clear as light; and no man for an instant hesitated for seventy-four years to say the *habeas corpus* clause, as written down in section 9, meant that the writ which secured the personal liberty of individuals could not be suspended by the Executive or Judiciary, and that the Legislature could suspend but for the occasion, and when the common safety required it.

The framers of the Constitution of the United States were all of them once English subjects, had ceased to be such, according to their own computation, some eleven years before the date of that instrument, and only four years, according to the British calendar. The revolution by which their Independence had been achieved was a thousand times declared by them to have no other object than to vindicate their rights to English laws and liberties, and among them none was oftener, or more strenuously insisted on than that of the *habeas corpus*. In their petitions to the Crown and to Parliament, in their remonstrances addressed to the people of England, of which there are several extant, these, they said, were what they demanded, these were their birthright, and for these they declared they would fight, if necessary. These, it was, which were claimed for them by British statesmen who took the American side in the controversy with the colonies, Chatham, Burke, Barré and the rest. The colonists claimed "the English principles of liberty," and the "common law of England as their unalienable birthright." Look at the State papers of the day, admirable specimens of good sense and good writing they are, for the cause of our separation from Great Britain, and it will be seen to be no-

thing but a determination not to be separated from English law.

The Quebec Act, which was one of the subjects of bitter colonial complaint, was an act of Parliament by which French laws were permitted to prevail in Canada, and the existence of which on their border, and so near to them, filled the minds of the Colonists with horror. They hoped to convert to their way of thinking the Canadians, and addressed long and eloquent appeals to them, setting forth in glowing terms the advantages of British laws and British liberties, among which they brought forward the writ of *habeas corpus*.

When the Continental Congress published their address of the 5th of September, 1774, to the people of the colonies, "their friends and fellow subjects," as they called them, they claimed, they said, only, and no more than, the benefit of British laws "and in claiming all the benefits "secured to the subject by the English Constitution to be "as free as our fellow subjects in Britain." They especially claimed "the benefit of the *habeas corpus* act, "the great "bulwark and palladium of English liberty."

When the revolution had been made, and the Constitution was framed, the population was for the most part of English descent. They were provincial, and England had been the mother country. When English liberty and laws had been denied them, and they broke into successful rebellion, the use they made of their independence was to restore and improve upon English liberty and laws. Whether to take from the Legislature and to give to the Executive the power of suspending their liberties would have been an improvement is a question to which I will presently advert. But certain it is that at and before '76 and in '87, the English Constitution, republicanised, and English laws accommodated to the wants of a newer and freer people, were the mark at which our ancestors aimed. Accordingly the Constitution of the United States abounds with, not only ideas and institutions, which

are directly and avowedly British, but with phrases which like the privilege of the *habeas corpus* are unintelligible but to Englishmen or Americans. To attempt to read the Constitution of the United States without referring ourselves to English History and English law would be vain labor. What is a bill of attainder, what is a convention, what are high crimes and misdemeanors if we reject English history? What is trial by jury, what are cases in law and equity, what is felony without the English law books? Of the ten articles of amendment which were recommended for adoption by the first Congress, but two years after the sitting of the convention, and now stand as part of the Constitution three only would be comprehensible without appeal to English precedent. Freedom of speech, and freedom of the press, the right of petition, are words to be understood as they have been understood in England, in the English sense intensified by the American revolution. What is the right to keep and bear arms, the security against unreasonable searches and seizures, what is probable cause, what is being put twice in jeopardy of life and limb, what is being compelled in criminal cases to be witness against oneself, what is due process of law, what is speedy and public trial, the accused being informed of the nature and cause of his accusation, and confronted with witnesses, what is excessive bail, excessive fines, cruel and unusual punishment, what do these things mean without the English precedents? When we bargained against cruel punishments, excessive bail, being put twice in jeopardy, and for trial by jury and the writ of *habeas corpus*, all this to which the States bound the Federal Government,—the terms on which they consented to surrender a portion of their freedom,—were contracts for and against these things in the full English understanding, and more too. What would have been the astonishment and disgust of the people, had they been told, and how quickly would they have rejected the Federal Constitution, could they have suspect-

ed that trial by jury meant less than the English trial, that to call a Convention to alter the Constitution meant less than the English convention of 1688, that it meant a diet or body not elected by the people, that freedom of speech and of the press and the privilege of the writ of *habeas corpus* were a privilege and a freedom of inferior stamp to the English!

But this is not all. The difference between the suspension of the *habeas corpus* in England and here, if we are to believe those who have taught Mr. Lincoln and would instruct us, is from a suspension by the Legislature to a suspension by the Executive. Very well! Now the Executive right is nothing in the world but that prerogative, so famous in English History as the *dispensing power*, one of the tyrannies which had disappeared in England long before the era of our independence, but which in the American ante-revolutionary remonstrances had a prominent place, and there was held to be a mere abomination. In the "second petition of several natives of America to the House of Commons of Great Britain in Parliament assembled, presented May 2d, 1774," after the passage of the then late two statutes, aimed at the people of Massachusetts, they say of that for "the more impartial administration of justice in Massachusetts Bay"—"The "dispensing power which this bill intends to give to the "Governor, advanced as he already is above the law, and "not liable to any impeachment from the people he may "oppress, must constitute him a tyrant"—And in the same paper speaking of both statutes: "It is with infinite and "inexpressible concern that your petitioners see in these "bills and in the principles of them, a direct tendency to "reduce their countrymen to the dreadful alternative of "being totally enslaved or compelled into a contest the "most shocking and unnatural, with a parent State which "has ever been the object of their veneration and love."

Now, is not the suspending power, as claimed by Mr. Lincoln, that dispensing power, which was one of the leading

causes of the revolution of 1688 and a feature of our remonstrance of 1774?

In England they suspend the *habeas corpus* by act of the Legislature. The houses of Parliament, for a period of time which they fix, enact that when six Privy Counsellors, or one of the Secretaries of State, put their names to a warrant charging an individual as guilty of high treason, or as suspected of it, or of treasonable practices (not disloyal which means nothing), and authorizing his commitment to prison, he shall be neither brought to trial nor bailed without an order of the Privy Council. To this restriction of liberty they add a clause saving the privilege of Parliament, that no member of the Legislature shall be arrested during the sitting of the house to which he belongs, without their leave asked and obtained, and without a communication to them of the matter of complaint against him. Sir William Wyndham and other Jacobite gentlemen had the benefit of it in 1715, when George I. sent to ask leave of the House of Commons to seize and confine them. This is the substance of all the suspending acts, passed since the revolution of 1688, of which there have been about eight in an hundred and seventy-three years.

It is a law which can only get through Parliament under a perfect storm of opposition; it is open every day, when the houses are in session, to inquiry on the part of members, and they use it freely, as to the condition of prisoners and the causes of their commitment, and they are, be it remembered, but few in number. It is liable to repeal at any moment when the will of the nation, as expressed by the popular branch of the Legislature, demands a return to the fullness of its freedom. Such is a suspension of the *habeas corpus* in aristocratic England, where the Legislature suspends.

With us it could be no more or less, if Congress suspended. But give the right of suspension to the President, and it is the old English *dispensing* power. In England the King could

once dispense, as he claimed, with an act of Parliament; he could dispense with or suspend for a time, its execution. In the United States, the President's dispensing power, more limited in its scope, would be more formidable in its effect, than this prerogative was. The King of England could dispense with by admission, certain classes of statutes—enough of them to make the prerogative dangerous to liberty, but not all. The President of the United States would dispense with one only, but that is the statute of freedom, of which it may be said, that, take it away and all others follow and disappear. The monarch could dispense with a statutory prohibition, or penalty, but not with the *habeas corpus* act. Under no view of prerogative that ever received general countenance could he have done that.

Here then we have, not a law repealable by the Legislature, by which in a certain way, for a limited time, and subject to checks and conditions, liberty is suspended by the suspension of the means of enlargement from custody in case of arrest. We have—God help us—a line and a half in the Constitution to the effect that the President may suspend the *habeas corpus*, when, by reason of rebellion or invasion, the public safety may urge him to it; and the argument is, a sound one, if the premises be admitted, that, as it is the Constitution which gives the power, Congress can neither add to, nor subtract from, nor control it, nor construe it, nor for one moment lay on it their meddling hand. It is beyond the reach of the Legislature. What is rebellion? What is invasion? The Congress does not know, and the President alone can say. What is the degree of public safety at which the country is to be kept? He must determine. For what time shall the suspension last? The President will say. What notice is to be given of it? None at all, none was given in July, 1861. The arrest is notice enough. This is a prodigious exaggeration even of the dispensing power; it is an edict, a rescript, an

order of the day, which has not about it an atom of free government.

Half a century ago we were more difficult. In January, 1807, the Senate passed an act suspending the *habeas corpus*; but the House of Representatives, contemptuously, by a motion to reject, the same day they received the bill, threw it out, there being but nineteen votes in its favor. It was sent to the House by the Senate as a secret communication, to be received with closed doors. They ordered "that the message and bill received from the "Senate ought not to be kept secret and that the doors be "now opened."

A President of the United States, if honest and wise, may be as good a judge of a public exigency as the Congress, and may, more readily than they, make up his mind, when it comes to action on it, but who does not see the difference between a subject like the suspension of the *habeas corpus* being dealt with on the one hand in debate, first, and then by a law—a statute—and, on the other, by the naked fact of the arrest of a citizen. The one is legislation, deliberative, plain and open; why is it resorted to, the manner in which it is to operate, and the time of its duration are before the people; the other is prerogative. Let the President have—and who has not—his "pliant hour,"—let him be liable to mistake—and who is not—and where are we? A minion, a mistress, a boon companion, a creeper in antechambers, and up back stair-cases, a false friend, or a soaring minister who has an injury to avenge, or ends to serve, exercises a little influence over the human frailty of a single individual, and no man is safe!

With the suspending power we are free, with the dispensing power we are slaves. We are free when we elect a Legislature to make laws for us, for that is representative government, the freest known to modern policy. We are not free when we elect one man to make laws for us, or, what is the same thing, to suspend them. There is liberty

where the Legislature makes the laws, and the Executive executes them, but there is none if he make the law and execute it too. If, by the Constitution, the President could raise and support armies, where would we be? And where are we, if, to recruit the ranks of the army, he can suspend the personal freedom of individuals? At Rome, the Senate, in what they deemed great emergencies appointed a dictator, but our dictator appoints himself! He is the judge of the emergency which calls for dictatorial service.

If this newly imagined right of the President be the dispensing power revived—and it is nothing else—let me add that it is a prerogative which, after long vexing the British people, proved at last fatal to their Executive, and was the main instrument in pulling down, in 1688, a system more ancient and more solid than any we have on this continent. Hallam, after noticing the variety of English opinion which had prevailed, from age to age, touching the extent and limits of this power, and, particularly, those of eleven of the twelve judges in a well known case under James II, adds that—

"It was the doctrine of the judges, that the king's inseparable and "sovereign prerogatives in *matters of government* could not be taken "away or restrained by statute. The unadvised assertion in a court "of justice of this principle, which, though not by any means novel, "had never been advanced in a business of such universal concern and "interest,—may be said to have sealed the condemnation of the house "of Stuart. It made the co-existence of an hereditary line, claiming "a sovereign prerogative paramount to the liberties they had vouch-"safed to concede, incompatible with the security or probable duration "of those liberties. This incompatibility is the true basis of the Re-"volution of 1688."

But it is not only that it seems to the last degree improbable our free ancestors, flushed with the success of the revolution, would have come down to such baseness. We know they did not. We have it from the strong friend of a stronger government than the people would bear, Mr. Hamilton himself, through the papers of the Federalist, that no such thing was imagined as to bestow on the Presi-

dent this power of suspending of the Constitution. We have it from the Federalist, numbers 67—77 inclusive, which treat the subject of the Executive, and are from Mr. Hamilton's pen. The greatest jealousy existed in many well disposed minds of the powers proposed to be conferred on the President. "The authorities," said the writer of the Federalist No. 67, "of a magistrate in few in-"stances greater, in some instances less than those of a "governor of New York have been magnified into more "than royal prerogatives. These attempts to misrepresent "the new executive render it necessary to take an accurate "view of its real nature and form;" and, accordingly, eleven numbers are devoted to that object, in the course of which Hamilton, beside a general and special disclaimer of any dangerous attribute to the President, gives one number, 69, exclusively to a parallel between the President and the King of Great Britain, on the one hand, and the President and the Governor of New York, on the other; and five numbers, 73—77, almost exclusively, to a minute analysis of the powers of the President, taking them up one by one, and examining each separately.

It will be agreed, it ought to be, that if Mr. Hamilton supposed the right of suspending the *habeas corpus* was among them, he owed it to his task not to omit a commentary on it. He could not have passed it by. And as it is unnoticed by him, the alternative is, either, that he did not understand the Constitution or that he knew the *habeas corpus* clause concealed a formidable engine of executive tyranny, hidden in the studied obscurity of language, and intended to be unseen and unknown until time should unmask it. Either supposition is out of the question, and it may be added that if this suspending power of the President really does lie buried in the *habeas corpus* clause, every member of the convention who was silent when Mr. Hamilton, Mr. Jay, and Mr. Madison defended the projected

constitution in the papers known as the Federalist, was accessory to a fraud on the country.

Now has or has not the Federalist barred the President from all pretensions to a power to suspend the *habeas corpus ?* In No. 73, Hamilton, after briefly treating the Constitutional provision that the President's salary should neither be increased nor diminished during the term for which he was elected, and having in the immediately preceding numbers 70, 71 and 72, considered the points of the unity of the Executive, the duration of his term of office, and his re-eligibility, and having in Nos. 67, 68 and 69 canvassed what is called "the Constitution of the Executive Department," and the mode of appointment of the President, and made the comparison between his office, on the one hand, and those of the King of Great Britain and Governor of New York on the other, thus proceeds: "The last of the "requisites to energy which have been enumerated is com- "petent powers. Let us proceed to consider those which "are proposed to be vested in the President of the United "States. The first thing that offers itself to our observa- "tion is the qualified negative of the President upon the "acts or resolutions of the two houses of the legislature," a subject which occupies the rest of No. 73. In No. 74 the pardoning power of the President, and his position as Commander-in-chief of the land and naval forces, are considered. In No. 75 the treaty making power. In No. 76 the appointing power. In No. 77 the examination of the appointing power is resumed and concluded.

The writer now says:

"The *only remaining powers* of the Executive, are comprehended "in giving information to Congress of the state of the Union; in "recommending to their consideration such measures as he shall "judge expedient; in convening them, or either branch, upon extra- "ordinary occasions; in adjourning them when they cannot them- "selves agree upon the time of adjournment; in receiving ambassa- "dors and other public ministers; in faithfully executing the laws; "and in commissioning all the officers of the United States.

"Except some cavils about the power of convening either house of "the legislature, and that of receiving ambassadors, no objection has "been made to this class of authorities; nor could they possibly "admit of any. It requires indeed an insatiable avidity for censure, "to invent exceptions to the parts which have been assailed. In re- "gard to the power of convening either house of the legislature, I "shall barely remark, that in respect to the Senate at least, we can "readily discover a good reason for it. As this body has a concur- "rent power with the Executive in the article of treaties, it might often "be necessary to call it together with a view to this object, when it "would be unnecessary and improper to convene the House of Repre- "sentatives. As to the reception of ambassadors, what I have said in "a former paper will furnish a sufficient answer.

"We have now completed a survey of the structure and powers of "the Executive department, which, I have endeavored to show, com- "bines, as far as republican principles will admit, all the requisites to "energy."

Such Mr. Hamilton, supposed to be the powers, and the only powers, of the Executive, under the Constitution; that is, the veto power, the command of the forces, the pardoning power, the treaty making power, the appointing power, the power to give information to Congress on the state of the Union, and recommend measures to their consideration, to convene them or either branch, on extraordinary occasions, to adjourn them when they could not agree on a time of adjournment, to receive ambassadors and other public ministers, to execute faithfully the laws, and commission all officers of the United States. Until the present Attorney General, in his communication to the President of the 4th July, 1861, disinterred and developed another and the greatest of them, so thought all the world. No statesman, no citizen, saw more Executive power in the Constitution than had been seen by the founders of it, and the commentators on their work—the writers of the Federalist.

If Hamilton in combating objections to the *plan* in No. 77, had said, some persons have been even reckless enough to assert that we have by this paper left it open to question whether the President might not suspend the *habeas corpus*, but that is a position too monstrous to need refutation, he

would at least have informed posterity that this chimera was in men's heads. But when, after stating, one by one, certain of the Executive powers, namely, the veto, the power of mercy, the command of the armed force, the treaty making power, the power of appointment, he goes on to say, "*the only remaining powers of the Executive*"—"THE ONLY REMAINING POWERS" are the powers which he proceeds to enumerate, and in the list makes no mention of a power to suspend personal liberty, then—granting Hamilton to have been a member of the Convention, and assuming him to have understood the Constitution in its more important features, but not more—I say the door of doubt is shut, and the gentleman may batter it as he pleases.

But I ask further attention, for a moment, to No. 69, in which the comparison is made between the powers of the President and those of the Governor of New York and the King of England, because neither the Legislature nor Governor of New York having power to suspend the *habeas corpus*, under the organization of that State, as it existed in 1787, nor the King of England, at any time, the omission to notice, in the parallel of the President with the monarch and the Governor, this supposed overwhelming authority of the Executive of the United States to suspend the personal liberty of the citizen is fraud, or nothing. A power leading directly, when used with such object, to the establishment of a tyranny, is an accidental omission quite out of the question with statesmen and publicists who were examining elemental principles and proposing a form of government not yet adopted; a government which the country was free to accept or reject.

The position and powers of the British King and the New York Executive are analyzed and criticised; the hereditary monarch, the Governor for a term of three years, the immunity of the king, the liability to impeachment of the republican magistrate, the executive revisionary authority of the acts of the Legislature of New

York, the British veto power, the command of the naval and land forces equally a function of each, the uncontrolled pardoning power of both, the proroguing power of both, their appointing power and other powers and functions are compared with those proposed to be bestowed on the President of the new republic. The parallel is carried out laboriously; the writer undertaking to show the President's power to be in all cases much less than that of the King, in several inferior and in some superior to that of the Governor, and then giving his judgment of the relative powers of the Governor of New York and the President of the United States in these words:

"Hence it appears, that except as to the concurrent authority of the "President in the article of treaties, it would be difficult to determine "whether that magistrate would, in the aggregate, possess more or "*less* power than the Governor of New York. And it appears yet "more unequivocally, that there is no pretence for the parallel which "has been attempted between him and the King of Great Britain."

But there is a point taken, in the course of the argument that the proposed powers of the Executive of the United States are not more dangerous to liberty than those then actually exercised by the Governor of New York, which merits particular notice. After explaining the difference between the control of the army and navy, as possessed by the Crown of England, and that exercised by the Governor of New York, and saying that in two of the States, New Hampshire and Massachusetts, the Executive powers were perhaps larger than could be claimed by the President of the United States, while those of the Governor of New York were quite as considerable as those of the President, he passes to the subject of "Conspiracies and plots against the Government" of the United States or that of New York, one, he thinks liable to be affected by the possible use of the pardoning power; or the advantage of the Executive in being, as he expresses it, "screened from "punishment of every kind by the interposition of the pre-"rogative of pardoning;" and he invites notice to the cir-

cumstance that while the Governor of New York may pardon all offences but murder and treason, even those for which the guilty party has been impeached, the President's right of pardon does not extend to crimes where there has been a conviction on impeachment. Here, looking to the dark side of the picture, and glancing with prophetic eye at the future, Hamilton thinks, that as concerns "con-"spiracies and plots against the government which have "not been matured into actual treason," and in which the Executive may have taken part, the difference between chief magistrates, who can or who cannot pardon their own accomplices, is one to be looked to. He has just regarded them as commanders of the armed force; and now looking at them as invested also with the attribute of political mercy, he points with jealous finger to the silly or wicked Executive, who himself a plotter against his country, can after using in vain his power to overturn its institutions, and after his conspiracy has failed, screen behind his pardoning power his fellow conspirators. Let anybody read what the Federalist anticipates of peril to the State, did the right of the Executive extend to the pardon of his own accomplices, and imagine what would have been the apprehensive forecast of the same mind, called to consider the same Executive armed, at the same time, with the additional power of facilitating his vile plots against the State by a Constitutional right to seize and hold at pleasure the persons of all citizens who ventured to interfere with his nefarious schemes.

"The Governor of New York may pardon in all cases, even in those "of impeachment, except for treason and murder. Is not the power of "Governor, in this article, on a calculation of political consequences, "greater than that of the President? All conspiracies and plots "against the Government, which have not been matured into actual trea-"son, may be screened from punishment of every kind, by the inter-"position of the prerogative of pardoning. If a Governor of New "York, therefore, should be at the head of any such conspiracy, until "the design had ripened into actual hostility, he could insure his accom-"plices and adherents an entire impunity. A President of the Union,

"on the other hand, though he may even pardon treason, when prose-
"cuted in the ordinary course of law, could shelter no offender, in any
"degree, from the effects of impeachment and conviction. Would not
"the prospect of a total indemnity for all the preliminary steps, be a
"greater temptation to undertake, and persevere in an enterprise
"against the public liberty, than the mere prospect of an exemption
"from death and confiscation, if the final execution of the design, upon
"an actual appeal to arms, should miscarry? Would this last expec-
"tation have any influence at all, when the probability was computed,
"that the person who was to afford that exemption might himself be
"involved in the consequences of the measure; and might be incapa-
"citated by his agency in it, from affording the desired impunity?"

Hamilton was regarding the "plan" with the eye of a law-giver. He looked on all sides, and to every thing. He examined it in detail. Here might be a danger, and he showed it was none. There was a contingent advantage, and he availed himself of it. He knew that the ship of State might be saved or foundered by a single plank. But if he praised the ship for such details as this supposed advantage in the possible case of plots and conspiracies, and said nothing of the power over the *habeas corpus* he over-reached us; he was like a navigator who recommends his friends to embark in a vessel because she has a new set of pumps, but says nothing of the hold being full of combustibles with a slow match and train to blow every thing into the air.

Here then is Mr. Hamilton on the Constitution, Mr. Hamilton on the *habeas corpus* clause of it. It is vain to say with his commentary before us on Executive powers, that it ever entered into the views of the framers of that instrument, that the President should wield this authority.

Hamilton went into the Convention, the advocate of what is called a strong Government; he was disappointed in obtaining one; his plans were overruled; but his patriotism got the better of his disappointment, and he lent his skillful hand to give finish and perfection to the schemes of others. When the *plan*, as it was called, was at last agreed on, and signed and submitted to the people, he united with Mr. Madison and Mr. Jay in defending it from the attacks, at every side made

on it, and in advocating its adoption. Did this person misunderstand the Constitution? Did he misrepresent it? Did a man, for whom is claimed by his admirers, the first place among American statesmen, and whose honor was as conspicuous as his genius, through ignorance or through malice lead us into this dire mistake which was discovered the 4th of July 1861?

No—the mistake is our own—in the strain of a revolution we have taken to reading the Constitution as we would read a penal statute—to pick a hole in it. If we look to it to carry out our wishes or fancies, and with determined contempt of the purposes of its founders, if the object is to catch them napping, we may, perhaps, pin them on a word, and be able to turn liberty out of doors. We may find for a grasping Executive, the dispensing power to-day, some other to-morrow, and a throne at last.

But great institutions must be studied by the light of events and the spirit of the people to whom they belong. The people of the United States made their Constitution to secure liberties which they had achieved by a revolution. When we put into it the words *by the President*, in the *habeas corpus* clause, we round a sentence, and give ourselves a master. Language is imperfect—that is true—and liable to be misunderstood, but the spirit and general purpose of a writing is rarely misapprehended. To seek the letter to the neglect of the spirit of a charter of government is to make our voyage by following the sinuosities of the shore when the wide sea lies open before us. The meaning of the English Constitution has overgrown its letter, until it seems to be almost foreign matter to it. The letter can tell us nothing. According to it the King chooses his ministers, appoints to office, vetoes laws, names the speaker, makes war and peace, and does not make members of the House of Commons. In point of truth, down to 1831 he made a large portion of the House of Commons, and many of them he makes yet, and they, not

he, choose the ministers who perform those functions of the state which he only seems to perform.

Right or wrong, it is the spirit of the American Constitution to make the legislative arm powerful, and the Executive arm weak. We have taken executive powers and bestowed them on Congress, but where is the legislative power which we have given to the President? The power of war and peace is regarded as executive: we have made it legislative. So with granting letters of marque; so with coining money; so with making rules for the government and regulation of the land and naval forces; so with the power to provide for calling out the militia, and for organizing, arming, disciplining and governing them when employed in the service of the United States. Thus have we laid our course, these are our institutions. Do we mean to change them—to haul down our colors and surrender at the first shot that is fired into us? To throw overboard our best anchor in the first squall? Shall we be blundered out of our liberties? Shall we yield them to a finesse? The learned gentleman, if he will pardon a still more ignoble illustration, with great respect be it said, and granting what is so far from admissible, that in groping the Constitution he has rummaged out an incomplete sentence, or words the meaning of which might be clearer, may be compared with an idle boy who disturbs the bottom of a stream to fish up at the end of his stick some dripping mass of incongruous and eccentric matter, which lying there since the flood had done no harm, and when held up in triumph by the discoverer of it, is but a congeries of nothings. Mr. Gouverneur Morris, and in citing him I appeal to no enemy of executive power, said of interpreting the Constitution in writing to Mr. Pickering in 1814, "This must be "done by comparing the plain import of the words with "the general tenor and object of the instrument." The plain import of the words with the general tenor and object of the instrument! Why they seem to have forgotten all

that totally! Allow me, too, to quote a section from Story on the danger of taking words and phrases of the Constitution at the cost of its true sense:

"But the most important rule, in cases of this nature, is, that a "constitution of government does not, and cannot, from its nature, "depend in any great degree upon mere verbal criticism, or upon the "import of single words. Such criticism may not be wholly without "use; it may sometimes illustrate, or unfold the appropriate sense; "but unless it stands well with the context and subject matter, it must "yield to the latter. While, then, we may resort to the meaning of "single words to assist our inquiries, we should never forget, that it "is an instrument of government we are to construe; and, as has "been already stated, that must be the truest exposition, which best "harmonizes with its designs, its objects, and its general structure."

Let us pass from the era of the Federalist to the second term of Mr. Jefferson, from speculation on the *habeas corpus* to the bill passed to suspend it by the Senate of the United States, and sent for concurrence to the House on the 23d of January, 1807. The Senate, considering Mr. Burr and his adherents as in rebellion against the government, and that the public safety required it, passed unanimously a bill by which it was enacted that "the privilege of the writ "of *habeas corpus* shall be and the same hereby is suspended "for and during the term of three months from and after "the passage of this act, and no longer," and Mr. Smith, of Maryland, was appointed to carry it to the House of Representatives, with a message requesting them to receive it in confidence, and act on it as speedily as the emergency seemed to demand. The bill had been reported to the Senate by a special committee raised to inquire whether the suspension was expedient, consisting of Mr. Giles, the distinguished Senator from Virginia, Mr. John Quincy Adams, then one of the Senators from Massachusetts, and General Smith, long a Senator from Maryland. General Smith having taken the bill to the House, with the Senate's message, they refused, by a vote of 123 against 3, to receive it confidentially, or keep the doors closed, and Mr. Jefferson's son-in-law, Mr. Eppes, of Virginia, moved that the

bill be rejected, a motion which prevailed by a vote of 113 yeas to 19 nays. The rejection was followed soon after by a motion of Mr. Broom, of Delaware, one of the members in opposition, that it was expedient to make further provision by law to secure the privilege of the writ of *habeas corpus* to persons in custody under authority of the United States, a motion which was three days under debate, which was made the vehicle of the strongest party assaults on the President for his conduct in, as was alleged, countenancing the violation of the *habeas corpus* act at the moment of the arrest of the friends of Mr. Burr, and which at last failed by a vote of 58 to 60. But it occurred to nobody, in either house, to doubt their right to suspend the *habeas corpus*, or to suppose that such a power existed in the Executive, though the occasion was one to call out all the ingenuity of the friends of the administration, party heats and accusations against them running high. The circumstances which attended the introduction of this bill, and the debate on it, were of a sort to make it impossible to believe, were such a thing for a moment credible, that a constitutional provision, which changed the whole aspect of the case, was overlooked, and that had the suspending right been in the President, and not in the Congress, it would not have been eagerly recognized by the friends of Mr. Jefferson.

I do not know that the annals of those times definitely inform us how there happened to be between the Senate and House so striking and decided a difference of opinion as appears in their respective votes, that of the Senate, taken the 23d January, and of the House the 26th, only three days after, no events appearing by the debate in the House to have occurred or become known in the mean while, to warrant their carrying by a prodigious majority a motion to reject, without reading, a bill which had just before had the unanimous assent of the Senators. It may be that a sudden alarm rapidly subsided. The Senate debates of that day do not appear, but those of the House show plainly that

the occasion was one when the friends of the Government would have been relieved from what was a position of much embarrassment, could they have attributed to the President the right, which all agreed was in Congress, to suspend the privilege of the writ of *habeas corpus*.

Gen. Wilkinson, commanding at New Orleans, had declared martial law, and arrested parties charged to have been concerned with Colonel Burr, and sent them by sea to Washington, refusing to respect the mandates of the courts of justice of Louisiana, to which application was made by the prisoner's friends, and treating with contempt writs of *habeas corpus* which were served on him or his subordinates.

Mr. Jefferson, who had committed himself to an approval of his conduct in seizing and sending these persons to Washington, had to encounter for it the heaviest fire of the opposition. They held him responsible for a violation of the Constitution. His friends had to defend themselves as well as they could. He was most anxious to detain the prisoners and bring them to punishment, and his displeasure at the course of justice, as administered by Chief Justice Marshall, and which appears by what has been left behind him in various forms, was extreme.

Now what had the President to do, when his friends in Congress were with difficulty bearing up against the assaults upon him, and when he was just about to undergo the mortification of seeing his prisoners set at liberty by the Court under the opinions in 4th Cranch? Why simply to use the Constitutional power if he had it, and hold the prisoners, or if he did not think proper to do that, to point to it—to allude to its existence! The Senate with the proof of rebellion before them, by an unanimous vote, had declared their judgment that the public safety required the suspension of the *habeas corpus*. Mr. Jefferson may not have thought so. His opinion on this point has not reached posterity. But if he differed with the Senate,

and coincided in the contrary conclusion of the House of Representatives, still it is most strange, pressed as he was, that neither he or any of that majority of the House which stood by him, bethought themselves to say that here was instead of the violence and tyranny so loudly charged, Executive moderation and virtue exhibited in abstinence of the most unusual kind; that the President's was the case, as surely it was if he held in his hands the power of suspending this writ, of one who submitted to be censured for extreme conduct when he had acted the most forbearing of parts; that having the power to arrest and hold without bail, and with the recent vote of the Senate to encourage him to the immediate exercise of his Constitutional authority—rather than resort to it—rather than suspend the freedom of the citizen, he had patiently suffered all the imputations which had been heaped on his conduct for countenancing an act of vigor of a military officer which he had but to adopt and make lawful; instead of which he stood by and saw all the fruits and advantages of it slip from his hand by the dismissal of the prisoners in the ordinary course of the administration of that very law which he was empowered to suspend!

Did Mr. Jefferson and his friends know—that is the question—that he was authorized to resolve the difficulty as Mr. Lincoln has? Did they hold their tongues when they had only to speak and overthrow the opposition at a word,—by reminding them that if the limits of the Constitution had been for a moment transcended by the course of a functionary of the Government, which had not been repudiated, it was to avoid the hard necessity of Executive resort to a more extreme but always Constitutional measure? If this was Mr. Jefferson, he was surely the most artless of men, the most innocent of politicians! If—to fall back on a warlike metaphor—such was strategy in 1807, I can only say it goes far to justify some of the self-carnage of 1862; for it was the case of a commander in a position de-

fended by an abattis and rifle pits, with, behind, a double line of breast works bristling with cannon, who handsomely comes down to engage the enemy in a swamp mid-leg deep.*

I leave this decision, this judgment passed by two branches of the government, the legislative and executive, against the right of the President to suspend the *habeas corpus*, with one more observation on these most strange

---

* As these papers are passing through the press, the attention of the writer is called, by a friend, to what seems to settle conclusively, that Mr. Jefferson, at least, to the year 1821, and his 78th year, thought with the rest of the world that Congress, alone could suspend the *habeas corpus*. At pages 67–8 of his Memoirs, Correspondence, &c., (London, 1829,) among what he calls "dates and facts concerning myself for my own more ready reference, and for "the information of my family," begun, he says, 6th of January, 1821, at the age of 77, will be found the following observations upon the work of the framers of the Federal Constitution:

"This Convention met at Philadelphia on the 25th of May, 1787. It sat "with closed doors, and kept all its proceedings secret, until its dissolution on "the 17th of September, when the results of its labors were published all "together.

"I received a copy early in November, and read and contemplated its pro- "visions with great satisfaction. As not a member of the Convention, how- "ever, nor probably a single citizen of the Union, had approved it in all its "parts, so I, too, found articles which I thought objectionable. The absence "express declarations ensuring freedom of religion, freedom of the press, "freedom of the person under the uninterrupted protection of the *habeas cor-* "*pus*, and trial by jury, in civil, as well as in criminal cases, excited my jeal- "ousy; and the re-elegibility of the President for life, I quite disapproved. "I expressed freely, in letters to my friends, and most particularly to Mr. "Madison and General Washington, my approbations and objections. How "the good should be secured, and the ill brought to rights, was the difficulty. "To refer it back to a new Convention, might endanger the loss of the "whole.

"My first idea was, that the nine States first acting, should accept it un- "conditionally, and thus secure what in it was good, and that the four last "should accept on the previous condition, that certain amendments should be "agreed to; but a better course was devised, of accepting the whole, and trust- "ing that the good sense and honest intentions of our citizens, would make "the alterations which should be deemed necessary. Accordingly, all ac- "cepted, six without objections, and seven with recommendations of specified "amendments. Those respecting the press, religion, and juries, with several "others of great value were accordingly made; *but the habeas corpus was left* "*to the discretion of* CONGRESS, and the amendment against the re-elegibility of "the President was not proposed."

See also—for reference to which the writer is indebted to the same source—page 446, Vol. 2 of Mr. Jefferson's Complete Works, as published by order of Congress in 1853, a letter to Mr. Madison, dated Paris, 31st July, 1788, for Mr. Jefferson's opposition to all suspension of the *habeas corpus* under any circumstances whatever.

events, as I am to suppose they are in the eyes of the statesmen who now rule us, and that is that there were two Senators who must have voted on the 23d January 1807 for the suspension of the writ by Congress, Mr. Gilman a Senator from New Hampshire and Mr. Baldwin a Senator from Georgia, both of whom were members also of the Convention which framed the Constitution, and both of whom, therefore, were as untaught in its provisions as were Mr. Hamilton, Mr. Jay and Mr. Madison. The vote of Mr. Gilman and Mr. Baldwin in 1807, the speculations of Mr. Jay, Mr. Hamilton and Mr. Madison in 1788 go to show either the profound and marvellous blindness of them all, or the truckling of the Attorney General to usurping ignorance in 1861.

The case of the parties sent to Washington from New Orleans, by General Wilkinson, next came before the Supreme Court, and Chief Justice Marshall delivered the two opinions, reported in 4 Cranch, the first deciding the right of the Court to issue a *habeas corpus*, and the second discharging the prisoners under it from their commitment for treason, saying, in the words of late so often repeated by those who cry out for their liberty, that it was Congress only, which by suspending the writ could for a moment, deprive us of its blessings. But what that great magistrate said is impugned as *obiter*.

Whether this is a just criticism may be doubtful, under the reasoning of 1861, which makes the act of the Executive, without proclamation, without announcement,—the fact itself of the citizen being arrested and held by the Executive, in time of rebellion or invasion,—a Constitutional suspension of the *habeas corpus*. If the seizure of citizens is to be construed into a suspension of the writ under the 9th section of the 1st article, which calls, it is argued, for no legislation by Congress, no notice on the part of the Executive to give form to this exercise of his power, if the blow without the word be enough, and constitutionally

sufficient, would it not have been proper for the Supreme Court to know the Executive Hercules by his step, and humbly recognize, in what was before them, the suspension of the liberties of the country? But no, no! We are told the point of the case was neither seen nor taken at the bar, and the unfortunate John Marshall thus left to blunder as he might through the mazes of the Constitution. Had the question of the President's power been perceived by the lawyers, and argued by those flaming ministers, the bench might have been instructed, and known better, but, left as they were to themselves, they supposed that Congress only could suspend the writ, and the Chief Justice committed himself to the declaration, that

"If any time the public safety should require the suspension of the "powers vested by this act in the courts of the United States, it is for "the legislature to say so. That question depends on political con- "siderations, on which the legislature is to decide. Until the legis- "lative will be expressed, this court can only see its duty, and must "obey the laws. The motion, therefore, must be granted."

Now if, as must be agreed, all the Courts in the country were once of a mind on this question, and your Marshalls and Taneys did but reflect, until the present Attorney General rose above the horizon an universal light, this *obiter* is better than the most formal judgment, after the profoundest argument of any *disputed* principle. Have not more than seventy unbroken years, during which the stream of judgment was not once ruffled with a doubt, settled the question? What so like to be right as that on which all the world is agreed? If the question has not been decided, because it was too plain to pause upon, the *obiter* is all we want. This point which is seventy-four years old, and has never been passed on by a Court, because nobody had the face to ask a Court to listen to the argument, is settled, and well settled; and let me add, with the most profound respect for the presence in which I stand, that it is not in judicial power to unsettle it, if they would.

It is a great political question; not a question of property. It involves the freedom of every citizen; no man who loves liberty and disdains to be a slave could hold up his head, if the Attorney General should prevail against us. When such a principle is to be settled, judicial opinion may be the apex of the cone, but its foundations must lie deep in the hearts of the people.

Before things had come to their worst in 1807 the late Chief Justice treated the question as one which never would be made. In 1861, after things had come to their worst, it was made, and the present Chief Justice decided it. If this has been error, it has been common error, and it is too late to correct it. It is *belief* and must be let alone. Nothing is safe if this can be touched. The weight of authority has been added to until it is overwhelming. We have it repeated to us, in every way, coming from every department of our system, and verified by a cloud of commentators. It is a point, on which men were not merely unanimous, but on which until this bad day, when Constitutional provisions are openly derided if they come in conflict with the exigency of the hour, to express a doubt would have shocked the public mind, would have shocked the constituted authorities, would have shocked the whole people of the United States.

Now if the *jus vagum* be intolerable when it carries hither and thither our titles to property, what shall be said of that uncertainty which shakes our highest institutions? When I trace back to 1774 our line of uninterrupted precedents against this monstrous claim, I do Mr. Cook's case injustice; the truth is that since the year 1669, when was passed the *habeas corpus* act of 31 Charles 2, no American until Mr. Lincoln's day, could have dared to deprive a citizen of his freedom, by suspending this writ. To bestow on the Executive of a republic authority to declare at discretion a condition of the country warranting him in suspending its liberty, is to subscribe to that carricature of free government so often drawn by its enemies, when they make it vibrate

from license to tyranny, and, tyranny to license. Strange that this Court by the events of but yesterday, should find itself compelled to demand an argument upon a power which, till now, neither in England nor in America any Executive has presumed to exercise since before 1688!

It is literally true that the opposite argument carries itself back to the day of the Stuarts. They said in England then as the Attorney General has instructed the President now, that the writ may be a very good writ, and is all very well until it runs afoul of prerogative; but that against Executive arrests it is of no avail, that the king's name is a tower of strength—that *habeas corpus* could not open the doors which had closed on a prisoner of the crown. I quote from Hallam who is speaking of Charles I.

"The King next turned his mind, according to his own and his "father's practice, to take vengeance on those who had been most active "in their opposition to him. A few days after the dissolution, Sir "John Eliot, Holles, Selden, Long, Strode, and other eminent mem- "bers of the commons, were committed, some to the Tower, some to "the King's Bench, and their papers seized. Upon sueing for the "*habeas corpus*, a return was made that they were detained for nota- "ble contempts, and for stirring up sedition, alleged in a warrant un- "der the king's sign manual. Their counsel argued against the suffi- "ciency of this return, as well on the principles and precedents employ- "ed in the former case of Sir Thomas Darnel, and his colleagues, as "on the late explicit confirmation of them in Petition of Right The "King's counsel endeavored, by evading the authority of that enact- "ment, to set up anew that alarming pretence to a power of arbitrary im- "prisonment, which the late parliament had meant to silence for ever. "A petition in parliament," said the Attorney General Heath, "is "no law, yet it is for the honor and dignity of the king to observe it "faithfully; but it is the duty of the people not to stretch it beyond "the words and intentions of the king. And no other constructions "can be made of the petition, than that it is a confirmation of the "ancient liberties and rights of the subjects. So that now the case "remains in the same quality and degree as it was before the petition. "Thus, by dint of a sophism which turned into ridicule the whole "proceedings of the late parliament, he pretended to recite afresh the "authorities on which he had formerly relied, in order to prove that "one committed by the command of the king or privy council is not "bailable. The judges, timid and servile, yet desirous to keep some

"measures with their own consciences, or looking forward to the wrath "of future parliaments, wrote what Whitelock calls 'a humble and "stout letter' to the king, that they were bound to bail the prisoners; "but requested that he send his direction to do so."

Let me add in conclusion—and it may be worth a passing thought—that, though the statute of 1669, and the revolution of 1688, changed the Constitution of England, they could not change the hearts of politicians, spoiled by indulgence in arbitrary power, and, the last of the unlucky Stuarts, after being driven from the throne of his ancestors, from the midst of his exile, said of the *habeas corpus* in his advice to his son—what we will do well to remember as the words of a narrow-minded tyrant—"That it was a great "misfortune to the people as well as the country that the "*habeas corpus* act had been passed as it obliged the gov- "ernment *to maintain a great force* and enabled the turbulent "to prosecute their evil designs."

That which protects liberty goes always more or less, against the stomach of authority; but to authority which is unfortunate and already contemptible—which is sick, weak, cross, fretful and timid, the bright face of liberty and all that belongs to it become absolutely hateful.

I come, now, to the second point, under the proclamation of the 24th September to which the attention of counsel has been directed by the first of the questions propounded from the bench; that of *martial law*.

There are here two questions. What is the extent of the power claimed, and whence derived?

To the first question, the obvious answer is that martial law must needs be a suspension of our liberties both of person and of property.

The second question is whether the power of proclaiming and enforcing it, which is called, by those who support it, the *war power*, is Constitutional.

It is said to be in the Constitution of the United States, and there I am about to look for it.

In June, 1812, an act of Congress was passed by which war was "declared to exist between the United Kingdom of Great Britain and Ireland and the dependencies thereof and the United States of America and their territories," and the President was "authorized to use the whole land and naval force of the United States to carry the same into effect," and thus the Executive of that day was invested with the war power. To him was given the control of the source from which flows by some channel or other the whole of that authority, be it less or greater, with which Mr. Lincoln is now invested. War was declared and the President authorized to use the land and naval force of the country to conduct it. When Congress passed this act they gave to the President, who is Commander-in-Chief of their forces, an enemy against whom to direct military operations of defence and attack. They need not have declared the war—they could have remained at peace. They had hesitated, ever since hostilities began between France and England in 1793, and might have made their war long before; but Congress chose to wait eighteen years. In all this time, the President could not stir, he had no Constitutional right to order a single gun fired on an enemy who was plundering our vessels, impressing our seamen and insulting us with every variety of injury and affront, under cover of a maritime law that was intelligible nowhere but in the English admiralty. In short, this war power, which, as early as under the Presidency of Washington, he had desired to procure authority to exercise for our redress, being lodged in the Legislature, and not in the Executive, he had not an atom of, till a law was passed by Congress. Not till then could he move. Thus through Congress it was that Mr. Madison came by his war power, and that Washington had to go without it.

Now, how came Mr. Lincoln by it? Congress alone

could raise and support the armies, provide and maintain the navy, with which the war was to be carried on; or lay and collect the taxes and borrow the money which should pay for this expensive medicine. Until Congress gave the word, Mr. Madison was an admiral commanding

"—— a painted ship
"Upon a painted ocean."

And his army was as painted as his ship. As by the 11th of the powers of Congress set forth in the 8th Section of the 1st Article of the Constitution, they are authorized "to declare war," so, by the 15th of the same powers, they are authorized "To provide for calling forth the militia to "execute the laws of the Union, suppress insurrections, "and repel invasions," and as by the act of the 18th June, 1812, the Congress declared war, and the President was authorized to use the land and naval forces to carry it on, so an act of the 28th February, '95, called "an act to provide "for calling forth the militia, to execute the laws of the "Union, suppress issurrections and repel invasions, and to "repeal the act now in force for those purposes," declared that "whenever the laws of the United States shall be "opposed, or the Executive thereof obstructed in any "State by combinations too powerful to be suppressed "by the ordinary course of judicial proceedings, or by the "powers vested in the marshals by this act, it shall be law-"ful for the President of the United States to call forth the "militia of such state, or of any other state or states, as may "be necessary to suppress such combinations, and to cause "the laws to be duly executed." In this act, and one supplementary to it, passed the 3d March, 1807, authorizing the Executive in cases of insurrections or obstruction to the law, to employ also, the regular land and naval forces of the United States, lie the war powers, with which Mr. Lincoln found himself invested, when first he exercised them. Congress, which gave Mr. Madison his war power in 1812, gave

in 1795 the war power which Mr. Lincoln began to use in April, 1861. It was as yet less than the power which Mr. Madison had.

What more is it now? On the 15th April, 1861, immediately after the fall of Fort Sumter, he issued his proclamation that the laws of the United States were opposed in certain States, by "combinations too powerful "to be suppressed by the ordinary course of judicial "proceedings, or by the powers vested in the marshals by "law." By the same proclamation he convened Congress for the ensuing 4th July, having already exhausted his lawful authority in using the navy and regular army, as then existing, and the militia of the States, as provided by the acts of 1795 and 1807. These powers authorized him to call for militia, and move them and the regular forces against the combinations; but wanting more, he had to resort to the Legislature.

By the Congress which met in special session the 4th July, and in regular session the December following, he was armed with further powers. What were they? Congress, which has the power "to declare war," "raise and support "armies," and "provide for calling forth the militia to "execute the laws of the Union, suppress insurrections and "repel invasions," has also the power "to regulate commerce "with foreign nations, and among the several states." Accordingly, by statute of the 13th July, 1861, entitled "An Act to provide for the collection of duties on imports and for other purposes," tney increased the war power of the President by authorizing him to collect duties, in the ports of seceded states, on the decks of vessels of war; to close some of their ports, cut off their commercial relations, and forfeit vessels and property in vessels attempted to be carried contrary to the authority to be used by the President under this act. This was the first step taken by Congress after their meeting to strengthen the hands of the President.

On the 29th of the same month an act was passed chang-

ing in several particulars that of 1795. It made military punishments more severe, and enabled the President to retain the militia called into the service of the United States, until he should discharge them by proclamation, provided it should not be longer than sixty days after the opening of the next regular session of Congress, unless they should otherwise by law provide. On the 6th of August an act was passed, making it "the duty of the President of the United States" to cause "to be seized, confiscated and condemned" all property which shall be purchased or acquired, sold or given with intent to be employed or used in aiding, abetting or promoting the insurrection, and freeing slaves in arms or employed in any work or labor against the United States.

The next act of Congress, also of the 6th August, 1861—to fortify the Executive with an indemnity—serves, in a degree, to mark the Constitutional limits of the powers of both. Between the proclamation of the 15th of April, calling for 75,000 militia, and ordering a special session of Congress, and the 4th of July, when they met, events had rushed on; and they were met by a proclamation of the President, dated the 19th of April, declaring the blockade of the ports of the then seceded States; also another of the 27th of April, declaring the blockade of the ports of Virginia and North Carolina, which had now seceded, and still another of the 3d May, calling for 42,034 volunteers to serve three years, increasing the regular army 22,714 men, and adding to the navy 18,000 seamen. "The call for volunteers," the President says, "hereby made, and the direction for the increase of the regular army, and for the enlistment of seamen, hereby given, together with the plan of organization adopted for the volunteers and for the regular forces, hereby authorized, will be submitted to Congress as soon as assembled." And finally came the proclamation of the 10th of May, directing the commander of the United States forces at certain places on the Florida coast, "to permit no person

to exercise any office or authority inconsistent with the laws and Constitution of the United States," and authorizing him "to suspend there the writ of *habeas corpus* and to remove from the vicinity of the United States fortresses, all dangerous and suspected persons." Of the powers exercised under these several proclamations I do not stop, for it is unnecessary, to inquire how much might be thought Constitutional. But we shall see that the President, at that day, himself supposed that his war power had a limit. In the message to Congress of the 4th of July, at the opening of the special session, he says:

"Recurring to the action of the Government, it may be stated, that, "a call was made for seventy-five thousand militia; and rapidly fol- "lowing this, a proclamation was issued for closing the ports of the "insurrectionary districts by proceedings in the nature of Blockade. "So far all was believed to be strictly legal. At this point the insur- "rectionists announced their purpose to enter upon the practice of "privateering. Other calls were made for volunteers to serve three "years, unless sooner discharged, and also for large additions to the "regular army and navy. These measures, whether strictly legal or "not, were ventured upon, under what appeared to be a popular de- "mand, and a public necessity; trusting then, as now, that Congress "would readily ratify them. It is believed that nothing has been "done beyond the Constitutional competency of Congress."

I make two remarks here. One, that we have from the President the admission of his incompetency to carry on the war alone, even when such backers as "popular demand" and "public necessity" were thought to support him; the other, that it does not follow when the President resorts to measures to which he is Constitutionally incompetent, but within the "Constitutional competency of Congress," that Congress *can* indemnify him. It does not follow that the indemnity which Mr. Lincoln here sought and Congress undertook to give by the act of the 6th of August, 1861, is Constitutionally available.

When Parliament passes an act to indemnify ministers, who, Parliament not being in session, resort to act of vigor beyond the Constitution, their indemnity is perfect, because

the power of Parliament is unlimited; not so with the President and Congress, whose power is bounded by a written Constitution. There is in Congress no power to afford the President indemnity for violating it. They could not transfer to the Executive their power "to raise and support armies," nor could they indemnify, though they might forbear to punish him, for assuming it. They could not tie their hands against the Constitution, and the day after passing this act they could have impeached the President, and degraded him from office. The bill of indemnity was as unconstitutional as the President's raising an armed force without the consent of Congress. I do not say it was not necessary to raise them, and what his real indemnity is, and ought to be, is a point to which I will come presently. It may also have been proper for Congress to give his measures and proclamations their approbation, but they had no right to enact that they were "legalized and made valid "to the same intent, and with the same effect as if they had "been issued and done under the previous expressed "authority and direction of the Congress of the United "States." That was their enactment, and it was beyond their line of authority.

Of the next act, that of the 31st of January, 1862, and the supplement of the 11th of July, of the same year, by which, the President, when he shall deem the public safety requires it, is authorized to take possession of the Northern telegraph lines and railroads, "with all their appendages and appurtenances, so that they shall be considered as a part and parcel of the military establishment of the United States," it is not necessary to debate the Constitutionality for any purpose of the present argument. It may however be safely said that the power of Congress to seize the property held, and supposed to be protected, by the charters of the several States which incorporated these railroads and telegraph companies, is equal to and not greater than their power to seize the cash and assets with "the appendages

and appurtenances" of the various banking institutions doing business under, and supposed to be protected by charters of the same States.

On the 17th of July, 1862, was passed an "act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." By this statute which, unlike those relating to telegraph and railroad lines, is directed at the population of the Southern States, the President is authorized to cause the seizure and apply its proceeds to the support of the army of the United States, of all the property of certain enumerated individuals; that is to say of officers of the army and navy of the States in arms against the Government—the President, Vice President, Members of Congress, Judges and other functionaries of the "so called Confederated States of America," whether "national, state or municipal," and further, of "any person who, owning property in any State or Territory of the United States, or in the District of "Columbia, shall hereafter assist and give aid and comfort "to such rebellion;" and provision is made for the condemnation, in any District Court of the United States, of all such property, after its seizure, "so that it may be made available for the purpose aforesaid," "whether real or personal."

These are the acts of Congress, unless in the mass of statutes passed since the 4th of July, 1861, something has escaped me, which give to the President all the war power he has under the Constitution. Do we find in them the power to enforce this proclamation? The President cannot make war, he cannot put down insurrection or repel invasion, he has no means of opposing "combinations too "powerful to be suppressed by the ordinary course of ju-"dicial proceedings," he could not, with the army and navy under his hand, employ them Constitutionally against a foreign enemy or traitor at home without an act of Congress. I will presently inquire what extent of war power Congress could invest him with, were they disposed to go all lengths.

All I now say is that here is Congress supplying him from day to day with whatever it is he has of it, and that if they took their hands from under him, he and his war power would come down together—they would vanish like a dream.

The President cannot in war or peace lay his hands on a citizen, or the property of a citizen, without an act of Congress. An act of Congress containing a declaration of war by Congress it is which enables him to use the land and naval forces against a foreign nation. An act of Congress enables him to use them against insurrection at home. From 1789, when the Government was organized, till 1807, when the act passed authorizing his applying the navy and regular forces to such object, it would have been impeachable to use any other arm than that of the militia of the States. Without the act of 1795, he could not have called for the militia. When the administration called for 75,000 militia-men after the fall of Fort Sumter, to march against the insurgents, it was by virtue of an act of Congress; and when in the midst of the emergency in which the Executive found themselves, they went further, the proclamation of the President admitted the absence of authority, admitted he was acting at his peril.

Without an act of Congress there is no army, no navy no war power. Whether the force is great or small—whether 6000 men, as not long since, make the army, or 500,000 as now; whether they are to be used against Europe or America, depends on Congress. Before the war of 1812 brought a naval force into favor, our need of a navy at all was a party question. It is as much in the sound discretion of Congress to raise or not an armed force, and when raised to use it, as it is in their discretion to increase or diminish the judicial force—as it is to establish this or that post-road, and when established to repair it or let it go unrepaired. Strange despotism, this of the President, which is given by Congress not till they please, taken from him

by Congress as soon as they please, and which while it lasts depends from hour to hour on the pleasure of Congress for its support! If the gentleman would give Constitutional substance to what is now his shadow of arbitrary rule he must go on and satisfy the Court that co-ordinate branches of the Government are as liable as individual citizens are to the proclamation and enforcement by the Executive of martial law—that acts of Congress may be "disloyal "practices," if they discourage volunteer enlistments" or "mi- "litia drafts"—that the Senate and House of Representatives not being "adequately restrained by the ordinary "processes of law," may be confined "in any fort, camp, "arsenal, military prison or other place," at the will of the Executive. His war power not to be ridiculous must be self-sustaining, and not dependent upon some other power.

The President has no implied or traditionary function. The law binds him as much as my client here. There is in that particular, no difference between them, except that while Mr. Cook can be punished once only, Mr. Lincoln may be twice punished for the same offence, once by the Senate, and again by the courts of justice. He only commands the forces,—his power is over the army what that of a colonel is over his regiment. He is as much bound by the Constitution as he was before the war broke out; he is no more emancipated from its obligations than any corporal who serves under him. He is "Commander-in-Chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States." He can direct their operations either in his own person, or by his officers. He may go to sea in command of the fleet, or fight at the head of the troops, but where do we find that he commands more than the sailors and soldiers; that he becomes arbiter of the life and liberty of the citizen?

Soon after the organization of the Government, an

opportunity offered to exhibit the jealousy of the men of that day of the exclusiveness of Legislative power over the question of war and peace. When Europe went into a war, at the end of the last century, which threatened to involve us in its flames, Washington published in 1793 his famous proclamation of neutrality, by which, in a few lines, after saying that Austria, Prussia, England, Sweden and the Netherlands were at war with France, he declared it to be "the disposition of the United States, to preserve a con- "duct friendly and impartial towards the belligerent pow- "ers,"—that he therefore warned our citizens "to avoid all acts and proceedings whatsoever, which might in any way tend to contravene such disposition," and made known that those who violated our neutrality would receive no protection from the Government; that instructions had been given to the proper officers "to cause prosecutions to be instituted against all persons who shall, within the cognizance of the United States courts, violate the law of neutrality with respect to the powers at war, or any of them." These were the terms of a State paper, which, in its day, gave so much offence to so many American citizens, which was assailed by Madison, defended by Hamilton, and divided the country. It was insisted that the President, in issuing it, fell short of our treaty with France, and passed the bounds of his Constitutional power; and this being denied by the friends of the administration, became a great party issue.

Our ancestors were nice, they snuffed heresy in the tainted air—or thought they did. They said, true the Executive may direct a prosecution, but what is this claim to interpret a treaty, when the point is war or peace?

I refer to this precedent, so well known in our history, because it goes to show that in the earlier days of the Republic, when those who best understood the Constitution were still living, the most virtuous and greatest man we have produced, or ever shall, was cried out at by half the country

for no more than proclaiming Executive views on a point that must eventually depend on the fiat of the Legislature.

There is in the Constitution to countenance the proclamation, no power for the President but that which he derives as "Commander-in-chief of the army and navy of the United "States and of the militia of the several States when called "into the actual service of the United States." He commands the army and fleet with the same proportional war power, and no more than is entrusted to the commander of a brigade or a frigate. All else is in Congress; and to this time their legislation has not authorized (if it could) martial law. Whether stronger than the Constitution, stronger than Congress, stronger than any institutions, war, like some subtle and powerful essence which alters and governs all it mixes with, converts, upon the instant, liberty into despotism, and a free people into slaves, is a further question which I will notice before I take my seat.

In the meantime, dismissing the point of the President's power, under the laws, as they stand, I come to the question not material to Mr. Cook, more than to the rest of the community, whether Congress is constitutionally capable to arm Mr. Lincoln, were they so inclined, with the right to issue and act upon this proclamation.

Our government is a government of limited powers; but more than that, what is not expressed is denied to it. Whence could Congress derive the right, to uproot the liberties of the citizen? What more could they do without suspending the *habeas corpus*, to make ready the President for hostilities, than pass the acts which I have cited? The Government of Rhode Island, which, like that of England, had unlimited powers till 1842, declared martial law, and the Supreme Court of the United States held their act to be valid. They might, but for the 4th section of the 4th article of the Federal Constitution, have declared themselves an hereditary monarchy, and the declaration of martial law, being for a temporary object, was ruled not to

gainsay the guaranty to each State of a republican form of government.

But the Constitution of the United States is an existing fact which seems to preclude the existence at the same time of martial law. Can the two facts co-exist? Can there be a government of limited powers, with checks and balances adjusted to the enjoyment by the people of the greates amount of freedom, consistently with, at the same time, in the same country, and for the same people, occasional tyranny?

To divide the powers of a State among an Executive, Legislative and Judiciary, limiting the power of each, and reserving to the people and the several communities to which they belong, all powers not expressly granted, and then to add to this machinery of freedom arrangements for the Constitutional production of arbitrary violence, at periods recurring so frequently as to return at every successive insurrection or invasion which fell upon the country, must be a strange system. It would be a folly such as no law-givers ever yet committed. What is the meaning of saying that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, if at short intervals, the Constitution is to be suspended, the laws turned out of doors, and the whole thing resolved into the simplest form of despotism?

Laws and rules may be liable to exception, but what if they defy and contradict themselves? Surely nothing could have been further from the thoughts of those who, though they did not plant our liberties, professed to provide for their protection and growth, than a Constitutional provision for their overthrow!

But let those who doubt come closer. What is the Federal Legislature? The Constitution in establishing the Executive, declares that "the Executive power shall be vested in a President of the United States of America." But not so with the Legislature. In the Legislative

article, after declaring that "all legislative powers herein "granted shall be vested in a Congress of the United "States," the Constitution proceeds to enumerate them. "The Congress shall have power:" 1. To lay and collect taxes. 2. To borrow money—and so on with the eighteen powers of the Legislative body. And these—all the powers it possesses—are defined and set forth.

The Executive executes the laws; the power of the President is not capable of being described in detail, as is the law making power which is defined by grants and restrictions. There is no power given to Congress which is not expressly given.

When the Convention met to frame a Constitution, it was the inclination of the majority of them, and the determination of their constituents, that the great powers of government should be given to the Legislative branch. The power they were to part with must be lodged somewhere, and the purpose was to place it with the Legislative body as the part of our system most immediately within reach of the people, and which consisting, unlike the Executive, of a number of individuals, it was supposed might be, if not the furthest from temptation to tyranny, at least not so anxious to seize a prize which must be divided among many. This was the opinion of the country, the wisdom of it, is not the question, nor yet the wisdom of giving away, under any circumstances, so much of their power as the States yielded in 1788. Were it to do again we would perhaps give less.

But the fact is certain that those rights which it was most dangerous to part with, were given to Congress. Men who differed on everything else, agreed on this. Mr. Jefferson wrote after the adoption of the Constitution "The tyranny "of the Legislature is the most formidable dread at present, "and will be for many years," and Mr. Gouverneur Morris writing in the same tone, called Congress the "Legislative

"lion." Hence, the extreme pains to state and circumscribe the powers of Congress. There was the power, not in the Executive.

The Executive shall command the forces, grant reprieves and pardons, with the aid of one branch of the Legislature appoint to place and make treaties, receive ambassadors, convene Congress on extraordinary occasions, and, after they are made, "*take care that the laws be faithfully executed.*" When Congress pass a Constitutional law, he is to see it Constitutionally executed.

Now, if martial law be Constitutional, let the power of Congress be shown authorizing the establishment of it. The Legislature of Rhode Island could enact in 1842 the temporary extinguishment of republican government, but the Legislature of the United States cannot. To be able to do so, the right must appear written down among the powers of Congress, but it does not appear, nor anything resembling or approaching it, or to which, accessorially or incidentally, such a power could possibly adhere. There is nothing among them to warrant the Legislature in oversetting the institutions of the country, either permanently, or as they did in Rhode Island, temporarily.

The war power is given to be exercised Constitutionally, and that means consistently with the Constitution, and consistently with the other powers and provisions contained in the Constitution. Congress, in carrying on war, must at the same time, carry on the Constitution. They would carry it on in defiance of the Constitution, if setting at naught the first section of the third article, which declares that the judicial powers of the United States shall be vested in certain courts, they authorized the President to order a military tribunal to try Mr. Cook. In defining and punishing "piracies and felonies committed on the high seas and "offences against the law of nations," they cannot set at naught the third clause of the ninth section of the first

article, which directs that "no bill of attainder or *ex post* "*facto* law shall be passed." They could not, after the act of piracy had been committed, pass a law increasing the penalty of the offence. They could not take the offender's case into their own hands, and pass a bill of attainder against him. One clause of the Constitution cannot be violated the better to carry out some other. The powers, provisions and restrictions contained in it must work together, or not at all.

No American statesman or jurist was heard to say, before Mr. Lincoln's time, that it was Constitutional to sacrifice one power or restriction to another power or restriction, on pretence that they were inconsistent; or that it was convenient or expedient to drop one of them. It has been, on the contrary, the test of the unsoundness of interpretation put upon a clause of that paper, that, were it adopted, some other clause would not have its operation. There is not a power of the eighteen conferred on Congress, to which the same reasoning does not apply, and it may truly be said of each of them, that if applied without regard to the other seventeen, our institutions would become positively ridiculous. Such a reading of the instrument would be worthy of the civilization of one of those African tribes to which Mr. Lincoln would like to send ambassadors, where the statesmanship of the chief is equal to the grasp of but one idea at a time. To-day the Constitution would be racked to coin money, to-morrow to make war, the next day to promote the progress of the useful arts, and so from power to power to the end of the chapter of absurdities! It would not be easy to overstate the grossness of the position that the war power eats up all the rest *according to the Constitution*—that such a rule is found *in* the Constitution.

But the war power is moreover, abhorrent to the whole spirit and object of the Constitution, which was intended to secure liberty. It was to secure liberty, for it only secured and did not give it. We had it already. We never were

slaves. We met in 1787, as freemen, to form a free Constitution, and consented to part with a portion of our freedom for the sake of the rest.

We agreed to limit ourselves to the extent there laid down. Hence we look into the Constitution for what the citizen may not do, not for what he may do. He is free to everything in which he is not there bound, and the Government is free to nothing but that to which they are there licensed. It was not put down in the Constitution that we shall not be sold into bondage, or shut up in a "fort, camp, "arsenal, military prison or other place of confinement by "any military authority." There needed no Constitution to assure us of that. Such filth was out of the question.

They can do at Washington exactly what is written down in the book, and no more. Everything else is unconstitutional, not merely because, unlike governments generally, they are limited by State power and the words of their charter, but because, in a free country, everything must conform to freedom. Liberty, and not the war power is the assimilator. The doctrine, which has made its way in more than one country of Europe, that power springs from the people, and which here is indigenous, could not hold, anywhere were it not well understood that to make a measure unlawful it is enough to show it is contrary to the genius and spirit of their institutions. Nearly fifty years ago—and the world has made great progress since then—when Louis XVIII came back the first time, his subjects were disgusted beyond measure because the charter, though quite a liberal one, was *octroyé*—it was power *given* by the sovereign. Does Mr. Lincoln, who supposes the union preceded the States, suppose that the power which the people have was a gift?

They have no provision in England against martial law, nothing in Magna Charta, nothing in the Bill of Rights; its inhibition is not to be found any more in the English Constitution than that of the United States; but what minister of the crown would so far trifle with his head as

to make that a reason for issuing such a proclamation as this? The history of that country—an oligarchy to which we have so often to turn of late, to look for our liberties—shows, to the dullest perception, that martial law proclaimed by the Executive would cost the first Lord of the Treasury his life, and drive the King into exile. They manifest the extremest jealousy of any appearance of military interposition in civil affairs, and the utmost boldness in denouncing it. Military domination would not be tolerated for a moment—even its trappings offend them.

When after the successes of 1815, a period at which the military may be supposed to have been at the height of favor, some show was made of guarding certain parts of the streets of London with them, on special occasions, it was fiercely attacked in Parliament, accompanied with bitter sneers at the Prince Regent, "who in imitation of the pomp of foreign sovereigns would wish to live surrounded by military guards."

When, after the great riots of 1780, which, the police being unable to cope with, the soldiers had been called in to quell, the same sort of inclination appeared, to put them in the place of the civil police, the people formed associations, purchased arms and taught themselves the use of them, in order should the disturbances be renewed, to be able to dispense with the military arm. Indignation meetings were held, and the county of Huntingdon expressed theirs in a resolution, "That it be recommended to every "housekeeper to have proper arms, such as musket and "bayonet, and to be ready and expert in the use of them; "*to be prepared against all emergencies that may arise from any* "*attack of our many surrounding enemies, or any invasion of* "*our rights and liberties.*" Let men who would cower before Mr. Lincoln draw encouragement from those who resisted George the Third!

But there is American authority to which I now turn, of

the most persuasive kind, to the point that, such is the structure of the Constitution of the United States; such the foundation on which it rests, that it is out of the question to seek in it any thing which is inconsistent with the most absolutely free institutions. Exactly this doctrine, by those who best understood the Constitution, was strongly urged when it was before the country for ratification and adoption.

When the "plan" came from the Convention to the States, it was objected to as not containing a Bill of Rights, such as that, for example, appended to the Constitution of the State of Massachusetts, of that day, which, in thirty items of the most comprehensive character, lays down that unreasonable searches and seizures of men's persons, houses, and papers, shall not be allowed, that the liberty of the press is not to be restrained, that the power of suspending the laws can be exercised only by the Legislature or under their direction—and other elemental positions.

But the framers of the Constitution of the United States thought these precautions unnecessary, they did not put into it a clause to forbid muzzling the press, another to forbid arbitrary arrests. They deemed it sufficient to establish only institutions which were liberal, and free. They did not provide against martial law, for in their work they did not suppose their fellow citizens would look for it. And in this way it is that in the Federalist No. 84, Hamilton answers the objection to the Constitution that it contained no *caveat* against tyranny. "Bills of Rights," he says,

"Are, in their origin, stipulations between kings and their subjects, abridg-
"ments of prerogative in favor of privilege, reservations of rights not surren-
"dered to the prince. Such was Magna Charta, obtained by the barons, sword
"in hand, from king John. Such were the subsequent confirmations of that
"charter by succeeding princes. Such was the petition of right assented to
"by Charles the First, in the beginning of his reign. Such also, was the
"declaration of right presented by the lords and commons to the prince of
"Orange, in 1688, and afterwards thrown into the form of an act of parliament,

"called the bill of rights. It is evident, therefore, that according to their "primitive signification, they have no application to constitutions professedly "founded upon the power of the people, and executed by their immediate "representatives and servants. Here, in strictness, the people surrender "nothing; and as they retain everything, they have no need of particular "reservations. "We, the people of the United States, to secure the blessings "of liberty to ourselves and our posterity, do *ordain* and *establish* this Con- "stitution for the United States of America;" this is a better recognition of "popular rights, than volumes of those aphorisms, which make the principal "figure in several of our state bills of rights, and which would sound much "better in a treatise of ethics, than in a constitution of government."

How small a thing was the desire with which Hamilton and other men of his day were charged, of accumulating too much power in the hands of the Federal Government, when it comes to compare with the mighty ambition of those who now administer it! "Here, in strictness, the people surrender nothing, and as they retain everything they have no need of particular reservations!" "We, the people," "do ordain and establish this Constitution,"—"this is a better recognition of popular rights than volumes of these aphorisms which figure in Bills of Rights!"

We have next a great truth too often denied and which told by Hamilton ought to have its utmost force. "But," he proceeds,

"A minute detail of particular rights, is certainly far less applicable to "a Constitution like that under consideration, which is merely intended to "regulate the general political interests of the nation, than to one which has "the regulation of every species of personal and private concerns."

"I go further," he says,

"And affirm, that bills of rights, in the sense and to the extent "they are contended for, are not only unnecessary in the proposed con- "stitution, but would even be dangerous. They would contain various excep- "tions to powers not granted; and on this very account, would afford a col- "orable pretext to claim more than were granted. For why declare that things "shall not be done which there is no power to do?

"Why, for instance, should it be said, that the liberty of the press shall not "be restrained, when no power is given by which restrictions may be im- "posed? I will not contend that such a provision would confer a regulating "power; but it is evident that it would furnish to men disposed to usurp a "plausible pretence for claiming that power. They might urge with a sem- "blance of reason, that the constitution ought not to be charged with the ab- "surdity of providing against the abuse of an authority, which was not given,

"and that the provision against restraining the liberty of the press afforded a "clear implication, that a right to prescribe proper regulations concerning it, "was intended to be vested in the national government. This may serve as a "specimen of the numerous handles which would be given to the doctrine of "constructive powers, by the indulgence of an injudicious zeal for bills of "rights."

The writer after some more remarks on the liberty of the press thus concludes:

"There remains but one other view of this matter to conclude the point. "The truth is, after all the declamation we have heard, that the Constitution "is itself, in every rational sense, and to every useful purpose, a Bill of "Rights. The several bills of rights in Great Britain, form its constitution, "and conversely the constitution of each State is its bill of rights. In like "manner the proposed constitution, if adopted will be the bill of rights of the "Union. Is it one object of a bill of rights to declare and specify the politi- "cal privileges of the citizens in the structure and administration of the gov- "ernment?

"This is done in the most ample and precise manner in the plan of the "convention; comprehending various precautions for the public security, "which are not to be found in any of the State constitutions. Is another ob- "ject of a bill of rights to define certain immunities and mod. s of proceed- "ing, which are relative to personal and private concerns?

"This we have seen has also been attended to in a variety of cases, in the "same plan. Adverting, therefore, to the substantial meaning of a bill of "rights, it is absurd to allege, that it is not to be found in the work of the "convention. It may be said that it does not go far enough, though it will "not be easy to make this appear; but it can with no propriety be contended "that there is no such thing. It certainly must be immaterial what mode is "observed as to the order of declaring the rights of the citizens, if they are "provided for, in any part of the instrument which establishes the govern- "ment; whence it must be apparent, that much of what has been said on this "subject rests merely on verbal and nominal distinctions, entirely foreign to "the substance of the thing."

It would be vain to endeavor to add strength to this.

I leave the argument in the hands of Mr. Hamilton, that a military tyranny is not to be found in the Constitution of the United States.

But after the publication of the Federalist, and after the Constitution had been adopted, as it stood, in compliance with the expressed wishes of the conventions of certain of the States, the first Congress, by resolution of September, 1789, proposed to the States, and they ratified them, the amendments, ten in number, to which reference has already been made, and these amendments provide for the absence from the Constitution of a Bill of Rights. They are:

"ARTICLE 1.—Congress shall make no law respecting an establishment of "religion, or prohibiting the free exercise thereof; or abridging the freedom "of speech, or of the press; or the right of the people peaceably to assemble, "and to petition the government for a redress of grievances.

"ARTICLE 2.—A well regulated militia being necessary to the security of a "free State, the right of the people to keep and bear arms shall not be in- "fringed.

"ARTICLE 3.—No soldier, shall in time of peace, be quartered in any house "without the consent of the owner; nor in time of war, but in a manner to be "prescribed by law.

"ARTICLE 4.—The right of the people to be secure in their persons, houses, "papers, and effects, against unreasonable searches and seizures, shall not be "violated; and no warrant shall issue but upon probable cause, supported "by oath or affirmation, and particularly describing the place to be searched, "and the person or things to be seized.

"ARTICLE 5.—No person shall be held to answer for a capital or "otherwise infamous crime, unless on a presentment or indictment of a "grand jury, except in cases arising in the land or naval forces, or in "the militia when in actual service in time of war or public danger; nor "shall any person be subject for the same offence to be put twice in jeopardy "of life or limb; nor shall be compelled, in any criminal case, to be witness "against himself; nor be deprived of life, liberty, or property, without due "process of law; nor shall private property be taken for public use without "just compensation.

"ARTICLE 6.—In all criminal prosecutions the accused shall enjoy the right "to a speedy and public trial, by an impartial jury of the State and district "wherein the crime shall have been committed, which district shall have been "previously ascertained by law, and to be informed of the nature and cause "of the accusation; to be confronted with the witnesses against him; to have "compulsory process for obtaining witnesses in his favor; and to have the "assistance of counsel for his defence.

"ARTICLE 7.—In suits at common law, where the value in controversy shall "exceed twenty dollars, the right of trial by jury shall be preserved; and no fact "tried by jury shall be otherwise re-examined in any court of the United "States than according to the rules of the common law.

"ARTICLE 8.—Excessive bail shall not be required, nor excessive fines im- "posed, nor cruel and unusual punishments inflicted.

"ARTICLE 9.—The enumeration in the Constitution of certain rights, shall "not be construed to deny or disparage others retained by the people.

"ARTICLE 10.—The powers not delegated to the United States by the Con- "stitution, nor prohibited by it to the States, are reserved to the States "respectively or to the people."

The States were jealous, their people sceptical, they said that, some day, by the door of implication, Federal tyranny would enter, and they demanded and obtained this Bill of Rights. It is stipulated that the rights not expressly granted to the central government, nor prohibited to the States, are reserved to the States or the people, and that the enumeration in the Constitution of certain rights be not construed to disparage those retained by the people. Thus the door seemed to be barred. If the

Federal Government had only the powers which expressly were granted, and the States and the people had all the rest, how could they be oppressed? There was nothing granted which could be converted to oppression. But an instinct, an undefined apprehension of what was to come in 1861, did not let them stop here. They went on, and, by eight of the ten amendments, provided *nominatim* against abuses. They have been violated, almost every one of them, in the last sixteen months! The freedom of speech, and of the press, the right of the people to be secure in their persons against unreasonable seizures, and unless by warrant issuing on probable cause, supported by oath, the provision that the citizen shall be held to answer for infamous crimes only on presentment of a grand jury, shall not be twice put in jeopardy of life for the same offence, that he shall enjoy the right to a speedy and public trial by an impartial jury of the State or district where the crime shall have been committed, that he shall be informed of the nature and cause of the accusation against him, that he shall be confronted with the witnesses against him, shall have compulsory process to bring forward his own witnesses, and the assistance of counsel in making his defence—where are they? WHISTLED AWAY BY ORDERS AND PROCLAMATIONS!

It remains only to examine the last position taken in justification of these measures to which authority has ventured to resort, I mean the ground of *Necessity*,—a necessity to use the war power created by insurrection and invasion, which demand, they say, the application of it. They say, necessity knows no law, nor Constitution either, and that abiding by the Constitution and law the republic must be lost, and may be saved by disregarding them. That the safety of the republic is the Supreme Law, and higher than the Constitution, and, for those who are in authority, it is a first duty to the State to save it from destruction. That to allow a man to walk abroad who is conspiring against the Government, at an exigency like this, is absurd. And, above

all, they insist, on the necessity, that nothing shall interfere with military operations.

What! they say, must the Colonel chaffer with the husbandman for the use of a field on which to encamp his regiment? Shall he let his troops and cattle starve while he cheapens their food? And, shall the President, who commands all the regiments, forbear to seize the whole substance of the State, if necessary, to apply to the support of those, without whose upholding arm, everything must come tumbling over our heads? If the country is invaded, can it be defended by the rules of law, if insurgent can it be put down by them? Do not tell us, they say, of the Constitution and law till the enemy is expelled, till the Rebels are cut off; should they prevail, your institutions which we offer to interfere with, for a moment, only, will vanish forever.

When counsel talks of the Law of War, I understand him; it is a Code, which has been so long practiced as to be intelligible. The law of war means, in the first place, the articles of war, existing by Act of Congress, and governing the Army and Navy of the United States according to which, even in time of peace, disrespectful words spoken of the President cost an officer his commission, and disobedience his life, sending a challenge, or taking too much wine, his commission, and by which the common soldier, who sleeps on his post, or leaves it before he is relieved, is shot; by which, in time of war, every officer and man who does not do his uttermost to destroy the enemy, is liable to suffer death.

It is a system for the armed force, vindicated, not by courts and juries, but military tribunals assembled at command, and under which, we have seen in every service, for they have their articles of war in all countries, soldiers of the highest rank disgraced and degraded, sometimes justly, sometimes as victims sacrificed by this law of necessity to public disappointment and unreasonable expectations. It

is a system of despotic discipline and severe examples, which are meant to inforce those extraordinary efforts which are required to meet the exigencies of war, when it comes, and, in the meantime, to temper and prepare men for it.

When the progress of successful war carries us into a hostile country, we take with us, if not this code, rules which are germain to it, and apply them to the inhabitants, their courts of justice, if those of an enemy were to be trusted, being usually found by an invading army closed, and the whole population disaffected to a new dominion suddenly imposed on them by force of arms. The necessity to keep them down, and the indifference of the conquerors to their fate, make military justice inevitable. The rule is *væ victis*, and they submit to it. So an insurgent country, one which had risen against its own government, and in which troops were operating, would be, for the like reasons, more or less liable to the same code.

So, the government of an invaded country, where the invaders had so far prevailed as to drive away the Courts and imperil the public safety, might be forgiven, should they undertake to supply the wants of the people and provide for the *Salus Republicæ*, guided by the law of necessity. For example, were England invaded, or in insurrection, the minister who took such measures with happy results—I say with happy results—would be indemnified by Act of Parliament. In the United States he would be probably indemnified so far as Congress was able to indemnify.

But, where would he be if he were unfortunate, and his measures came to disaster? Or, would he be indemnified if his course were preposterous or dishonest? If he were all wrong? Shall he be indemnified when he treats alike South Carolina and Pennsylvania? Shall he be indemnified for bringing to bear the articles of war upon a region where there are no military operations, no public enemy, no insurrectionary people, and where, though prosperity seems to have disappeared, tranquility yet remains? Is the war

power well used on us? The courts of Pennsylvania are open, justice never was stronger, the government, if it is staggering, does not stagger under our blows; on the contrary it has the unlimited command of all our resources. If traitors and rebels are abroad, why not let them be arrested and tried according to the law of the land! Shall whips and scorpions be our institutions, and no man know why? Shall this iron rule govern, as if we were enlisted sailors or soldiers, as if we were the inhabitants of a conquered province, as if we were insurgents against the State, as if we were living in the midst of sacked cities and devastated fields, with all the appliances of public and private affairs so thoroughly disjointed as to make it the duty of power to save us from final ruin by the most desperate measures? Is this your necessity? Does your *necessary* war power protect authority against the consequences of dropping the law and taking up the war power before its time, and when there seems to be only one motive for it, which is by no means the reason given?

If counsel mean that Mr. Lincoln and Mr. Seward, who have put their names to this proclamation, are answerable for it with their heads, that they have the same right, but no more, to save the country at the expense of the law than I have, or any other citizen, there is no dispute between us. He is comprehensible enough. He tells us then that the proclamation of the President, countersigned by the Secretary of State, is not more binding than if it were issued by the Marshal of the District and certified by the Clerk of the Court. But he does not say that; he tells us this paper is the law, and that you, sir, a magistrate invested with judicial authority, are bound by your oath of office to carry it out; and that I deny.

I deny his whole position. I deny that it is comprehensible. Gentlemen tell us of the war power and the necessary war power, but nobody yet has drawn forth this monster from his thoughts, and explained to us what it is. Even

when at peace we were liable to *dominant ideas.* Is not this war power an *ism?* Is it not one of that class of fallacies? — a phrase of bombast, a large word signifying nothing? Shakespeare, who took the wind out of so many sails, and drew the curtain both of past and future, foreknew the ways of 1862. A plain question being asked by certain citizens of Venice, the Commander-in-Chief to whom it was put, he says:

> "Evades them with a bombast circumstance,
> "Horribly stuffed with epithets of war."

It was, no doubt, the war power—the war power which is not in the Constitution, but in the high necessity of the case—the will of the General. But what can that be to the free citizen of an uninvaded country? In the enemy's country it is everything. It is something, as between the seceded States and the Union. But it is "a tale told by an idiot," when they talk of applying it to Pennsylvania, to a region in its normal condition, as we are to-day, for we are abnormal in nothing but the usurpations of authority.

Rights and duties, let me tell the learned gentleman, are reciprocal in Pennsylvania. When a community assembles and makes its laws, they are to be administered by those in power and obeyed by the people; the right of authority is to command, the duty of the citizen to obey. But is it the right of authority to command that which it is not the duty of the citizen to obey?—Can they command that which he must not obey? If counsel ask, as they do out of doors, whether any good citizen, in Mr. Lincoln's place, would not do as he has done—usurp, I answer his question with another question, would not any good citizen in our place do as we do—resist?

If the President may be right in his resort to force because he thinks it necessary, the citizen cannot be wrong, when, thinking it unnecessary, he resists. Mr. Lincoln must remember that force is the game of kings. If he were an hereditary monarch, to strengthen his hands and

increase his power would be respectable—would be acting his part. His course would not be revolutionary because it might be successful. But where men have liberty, and he is only one of them, he commits a fault when he invests them with the right of resistance. To offer to usurp without the power to carry usurpation through, is a folly.

When, before arms were taken up, and points of doctrine were still discussed in the country, the Southern States upheld secession as a Constitutional right, to which Mr. Lincoln answered and we all answered: yes, it may be a right, but not a Constitutional one, it is the right of Revolution, it is a right not founded in law, but force, it is good if you are stronger than we are, and not otherwise. If he has adopted the Southern code and intends to carry it out, if this be the proclamation, it is intelligible, if not, I profess myself unable to understand it.

I see no half-way house between the law of the land, and no law at all. If I reject the law, I am an outlaw. If this paper does not mean the law of the land it means violence, and the citizen's right is to resist it.

If Mr. Lincoln can proclaim the law of fire and sword, so could John Brown, who was about to make his proclamation when he was cut off by the other law. Any gloomy enthusiast who may appear among us, like those Puritans of Cromwell's day, whose religion, above the Gospel, above virtue, above faith and works, was fed by an inward flame of fanatical convictions, which made their possessor independent of God and man, may come and exercise his fury upon us, if he can. His title to proclaim necessity is as good as the President's. When it comes to that, all are equal, and one man is like another; place, order and degree are nothing. Any man may save his country. Whoever, no matter how humble, will assume upon his soul and body the responsibility of dashing aside the law, and rescuing the imperilled State by a miracle of his own performance, may perform it if he can, and take the consequences if he cannot.

And, when they talk of a necessary war power, do they mean that any war, no matter whether great or small, how or why declared, or carried on for no matter what object, and in what manner, has this magical effect of swallowing up the freedom of the people, in whose name it is declared? If war resolve us into a despotism, what sort of war must it be? The Mexican war was a flea bite—would it have sufficed to Mr. Polk for a proclamation like Mr. Lincoln's? If not, and only great wars will do, is there no difference between great wars which, by uncontrollable events, are forced upon a patriotic government, and those which the follies of a government drag down against their cries and remonstrances upon the heads of the people? Are we slaves to necessity alike in both cases?

Not only may hostilities be forced on an unwilling people, but with motives on the part of their rulers, good or bad. The Congress of '76 made a war, and so did Madame de Pompadour. It may be waged for the basest reasons, or for the purest and best, to secure the Union or accomplish its destruction, to subserve the great ends of the country, or to maintain in power and place, and gorge with ill-gotten wealth, the ignorant and vile.

And where did Mr. Lincoln learn that war was such a curse that it mattered not how many others came with it? Had we gone to war on the Maine boundary question, in 1846, or the Oregon question in 1842, we would not be where we find ourselves to-day. A year or two of hostilities, with a foreign enemy, would have saved quarreling at home, refreshed the people, purified our institutions, produced a crop of statesmen, expelled faction, cleared the country of much rubbishy politics, and, giving us something better to think of than the fugitive slave law, made good the Union for a century to come. A war,—the war of 1812, first made us a nation, and brought forward those great and patriotic men, alas! no more, who, could they have lived till now, would not have let us sink to our present depths!

Did Mr. Lincoln ever trouble himself to think how many

years of national life, the world over, are passed in hostilities? Ours is a country of trade and peace, but about a sixth of our short existence reckoning from the outbreak of the revolution to the happy era of his own inauguration, and including only the two wars with England and the one with Mexico, we have been fighting—yet never were made slaves till now. The Constitution which secured the citizen his liberty only in time of peace, would be a cheat, and Mr. Lincoln's philosophy, if it teach otherwise, is ignorant, shallow, and pernicious.

The temple of Janus was shut twice only in five prosperous centuries, and the great and all-wise Bacon said that arms should be of a nation the "principal honor, study, and occupation;" that a "just and honorable war is the true exercise" of a people. If war mean chains and slavery, why did he advise it? But wars such as the Romans waged, and Bacon counselled to his bold countrymen, were not the wars of scurvy politicians.

It would be easy to show, without going far for the illustration, that worse misfortunes than war can befall a country. Neither the wars of modern England, nor ancient Rome, brought with them the enslavement of the people. The English have progressed steadily in freedom, and the vast conquerors of the world only lost theirs after bad men, the moths of peace and base material views had so degraded Roman politics that if they wanted a consul they took a horse instead of a statesman.

But let us look to that philosophy which teaches by examples. If the rule be as contended by counsel, we shall find it in the practice of nations.

When the gentleman talks of rule and law, I suppose he means to speak of the rule and law of the United States, and of England, the law of England, since 1688, and the law of the United States, as it always has been—which is the law of England, with rather more of the light and air of freedom let in upon it, since the achievement of our independence. Very well. Let him take to his books, and

find me the American precedents of martial law. Let him show me, if he can, by the volumes containing the laws and annals of England, since their revolution, such policy as you are urged to rule this day, such despotism under the British crown as we are required to submit to in this republic. I do not mean their law for the East Indies or Cape of Good Hope, or their history there. I do not ask what they may have done in their distant possessions, but at home. They may have one rule for their dependents, and another for themselves, and that is very natural.

No British king, since 1688, has proclaimed the law of war or, for a moment, attempted to execute it. Yet there have been junctures there and plenty of them as threatening and dangerous as ours of to-day. From the dethronement of James II, in 1688, to the accession of George III, in 1760, the succession to the crown was in dispute, much more than half the nobility and gentry being traitors in their hearts, and no small number of them in act. Marlborough who led their armies, Bolingbroke who ruled the State, and other men of the highest condition, were exiled or sent to the tower. Some were executed for their treason. The kingdom was three times in actual insurrection. Plots to bring about a change of dynasty never ceased; and once the insurgents with the Pretender at the head of a victorious army were within four days march of London. William, sitting upon an unsteady throne, had to contend, during his entire reign, amid constant defeats in the field, with the overshadowing power of Louis XIV; and his successors, down to George III, fought all their foreign wars with discontents and rebellion, smothered or actual, at home.

After, under George III, they had passed through one successful war, and one that was most disastrous, the French revolution broke out and flooded so many lands, England among the rest. They were in the greatest danger. French principles, as they were called, seemed ready to overwhelm them. Societies and organizations existed all over the country for their introduction, and for fraternizing with the

revolution. The nation would have been swept into the vortex had not the aristocracy, who had everything at stake, resisted, with, on the part of the majority of them, the utmost determination. But the agitation was terrible, the wisest heads were staggered. English sobriety of judgment seemed to disappear. Everything ran to excess, and all opinions were extreme. A man like Mr. Burke was insisted to have actually lost his senses and to have become a sort of magnificent political lunatic. The fleet mutinied at the Nore, invasion was imminent, the successes of the enemy assumed a magnitude of military proportions such as had not been known in the world since the fall of the Roman Empire.

It is not necessary to recapitulate English troubles between 1790 and 1814, or go through their ups and downs since 1688. Suffice it to say that, throughout them all the municipal law prevailed; that system,—and administered by the regular courts of justice—was the only law and equity which England knew, unless when the *habeas corpus* was regularly suspended by act of Parliament, in this century and three quarters of time. If during those checkered days the gentleman can find that the British Crown once attempted to try a British subject by military commission, or ventured to immure him "in any fort, camp, arsenal or military prison, or other place of confinement by military authority," not being a soldier or sailor, or dared to charge against him such a mock offence as "disloyal practices,"—if he can find that they did not, on the contrary, uniformly, and always, whatever may have been the extent of public peril which surrounded them, tolerate free speech and free action in all men, whigs, tories, traitors, radicals and revolutionists, no matter whether their object was to overturn the government, or only to change the administration of it,—subject to no other responsibility than that of punishment according to law; if he can find that the war power, or the law of necessity, or anything like it, ever was proclaimed or acted on, he will prove himself a discoverer

indeed. I say that in the country of which we speak, such an invasion of liberty would be regarded as revolutionary, and treated accordingly.

So much for English example. What has been our own? The war power, unless for the army and navy, or militia when called into the service of the United States, was never once exercised;—its existence was unimagined. From the meeting of the first Congress in this city, in September, 1774, less than two years before the declaration of our independence, to the peace of 1783, at which it was acknowledged by England—nine years of revolution, and eight of civil war;—during the period of our confusion and weakness, from the peace of 1783, to the framing of the Constitution, in September, 1787, and its ratification by the States, and the organization of the government under it, in March, 1789; thence, in our time of national infancy, through the excitement of the revolution of our friends and allies, the French, to whom we were under treaty obligations of a very embarrassing kind, a period of infinite perplexity, when we were hardly able to bear it; afterwards, through the perils which attended our neutral position, when the rest of the world was fighting, down to the war of 1812, at the end of which, we, for the first time, found ourselves in smooth and deep water; and thence to the election of Mr. Lincoln in 1860;—during these eighty-six years, in the course of which the opportunities—if war and calamity could produce them, were of but too frequent recurrence, no American statesman, no President, no Congress was ever rash enough to anticipate the law of the 24th of September, 1862.

Anything like it our history has not developed—our people have never imagined! Martial law and military prisons?! No political pilot, no untoward events, no tides or currents, no war and revolution ever carried us within sight or sound of such breakers as these! To sail upon such a sea of folly was reserved for honest Mr. Lincoln.

But I do not stop with the negative; with the fact of the absence of a single case of assumption of this necessary power. I proceed to show, by the English and American books, what must have been the predicament of the Executive who took such a step. I do not confine myself to British authority since their revolution.

Sir Matthew Hale, who died in 1676, brings this law to its true proportions, at a word. He says it is no law.

"But touching the business of martial law, these things are to be observed, "viz:—First. That in truth and reality it is not a law, but something indulged "rather than allowed as a law; the necessity of government, order, and dis- "cipline in the army, is that only which can give those laws a countenance, "*quod enim necessitas cogit defendi.*"

"Secondly. This indulged law was only to extend to members of the army, "or to those of the opposite army; and never was so much indulged as in- "tended to be executed or exercised upon others; for others who were not "listed under the army, had no color or reason to be bound by military con- "stitutions, applicable only to the army, whereof they were not parts; but "they were to be ordered and governed according to the laws to which they "were subject, though it were a time of war."

Lord Loughborough, as Chief Justice of the Common Pleas, in the case of Grant *vs.* Gould, in June, 1792, says of martial law, "it does not exist in England at all."

"Where martial law is established, and prevails in any country, it is of a "totally different nature from that which, by inaccuracy, is called martial "law, merely because the decision is by a court martial; but which bears no "affinity to that which was formerly attempted to be exercised in this king- "dom, which was contrary to the constitution, and has been for a century "totally exploded."

Blackstone, who delivered his lectures in 1758, afterwards published as commentaries on the Law of England, and who was no enemy of power, when he comes to martial law rejects it.

"For martial law which is built upon no settled principles, but is entirely "arbitary in its decisions, is as Sir Matthew Hale observes in truth and "reality no law, but something indulged rather than allowed as law. The "necessity of order and discipline in an army is the only thing which can "give it countenance; and therefore it ought not to be permitted in time of "peace, when the king's courts are open to all persons to receive justice "according to the laws of the land."

I must not omit to observe that English authority shows how they regard, in that country, the military law, even when applied to the soldier. The civil courts recognize, and are bound to recognize, the articles of war, as part of the law of the land, but woe to the military man who steps beyond the line of his strict right. If he use his authority with motive which is not legitimate, or in passion or anger, if he compel, at the hands of his subordinates, the performance of functions, or obedience to orders which, however praiseworthy, are not in the book of military duty, as for example to attend school—which is one of the reported cases—if he anywhere cross the limit, he must answer for his error in courts which hold him to a jealous account. What he does is weighed and measured. What, in another department of the law, we call the excessive execution of a power, is dangerous. The cases on this head are numerous.

In one of them Colonel Wall, the Governor of a British West India Island, was tried for having punished by whipping a soldier, who died of his hurts. Several witnesses showed the outrageous conduct and violent language of the deceased. The witnesses for the prosecution were contradicted in material points. The prisoner was a man of rank, had distinguished himself in the field, was nobly connected, and strange to say, earnestly solicited and insisted on being tried for the soldier's death, which had taken place not less than twenty years before, and of which he believed himself innocent; but, the jury at the Old Bailey having found him guilty, Colonel Wall was hanged in 1802 for excessive execution, in 1782, of his power of martial law.

I take up now our own books, where we have a case in which the whole ground was covered by every department of government, Executive, Legislative and Judiciary and by the sentiment of the entire country beside. I mean the case of what is called General Jackson's fine. It serves to show the view which was universally taken, as lately as in 1843, by the authorities and people of the United States,

of all classes, of the difference between justifying martial law and only tolerating its exercise subject to punishment.

Gen. Jackson having enforced martial law at New Orleans in the winter of 1814–15, then beleaguered by the British, and his measure being impeached in the newspapers of the place by Mr. Louallier, he arrested him, and Louallier having obtained from the judge of the district court of the United States, for that district, a writ of *habeas corpus*, Jackson caused the person of the judge, also, to be seized and conveyed beyond his military limits. When, some days after, official news was received of the peace of Ghent, the judge being released, again opened his court, summoned Jackson to his presence, and imposed on him a fine of a thousand dollars, which was instantly paid.

This act produced a strong feeling of the kind so natural to freemen when they see, underany circumstances, and in any emergency no matter how pressing, the military power placed above the civil; and Jackson, all covered with laurels, was promptly, though interms full of courtesy, called to account when intelligence of what had passed reached Mr. Madison. The acting Secretary of War, the late Mr. Alexander James Dallas, was instructed to address him, and wrote, under date of the 12th April, 1815, an official letter by which after expressing the national gratitude and that of the government for the prodigious services which had been performed by him, and after setting forth that representations had been made to the President "respecting certain acts of military opposition to "the civil magistrate, that require immediate attention, not "only in vindication of the just authority of the laws, but "to rescue your own conduct from all unmerited reproach," he proceeds thus:

"From these representations, it would appear that the judicial power of "the United States has been resisted, the liberty of the press has been sus- "pended, and the consul and subjects of a friendly Government have been ex- "posed to great inconvenience by an exercise of military force and command

"The President views the subject, in its present aspect, with surprise and so-
"licitude; but, in the absence of all information from yourself relative to
"your conduct, and the motives for your conduct, he abstains from any deci-
"sion, or even the expression of an opinion upon the case, in hopes that such
"explanations may be afforded as will reconcile his sense of public duty with
"a continuance of the confidence which he reposes in your judgment, discre-
"tion, and patriotism. He instructs me, therefore, to request that you will,
"with all possible despatch, transmit to this department a full report of the
"transactions which have been stated; and, in the meantime, it is presumed
"that every extraordinary exertion of military authority has ceased, in con-
"sequence of the cessation of all danger, open or covert, upon restoration of
"peace."

But time brings with it oblivion of our faults. This fine was by the Congress of the United States repaid in 1843, twenty-nine years after. It was repaid under circumstances to produce the extremest sanction of Jackson's conduct which it was possible for a grateful country to bestow; but without its occurring even to his most ardent admirers to go the length of pretending a legal justification of his act. It would be needless to recur to the warmth with which the subject of restoring this small sum of money was pressed, the heats which it caused, and the spirit of investigation of the whole question of martial law which was awakened throughout the country. It became a prominent topic of the day. Eighteen States of the Union passed resolutions, which were transmitted to Congress, expressing their wishes that the amount of the fine be refunded.

Pressed with the utmost zeal by one side, and opposed or discouraged by the other, it became throughout the Union a party test.

The conduct and motives, and even the character of the judge who had imposed the fine, were impeached in debate, so far did their ardour transport the majority. They finally succeeded, by very large votes of both Houses, in carrying through a bill, which was to approve, to the utmost limit, to which approbation could go consistently with the Constitution, the conduct on a trying occasion of a public servant of boundless popularity. It would not be too much to say that in the course of the

examinations of the subject of martial law which took place, at and before the passage of this act of Congress, in all parts of the country, no publicist came to the conclusion that martial law was more than law which was the law when it was too strong to be resisted; and it may confidently be asserted that to the opposite conclusion came without hesitation or doubt the universal mind of the whole country. Both parties and all persons in and out of Congress united on it.

The case was also judicially considered almost immediately after the events which gave rise to it, by the Supreme Court of Louisiana in March term, 1815, in Johnson v. Duncan, to be found in the 1st vol. of the Condensed Reports of that State, page 157. I read from the opinion of Mr. Justice Martin on that page:

Martin, J.—A motion that the Court might proceed in this case, has been resisted on two grounds:

"1. That the city and its environs were, by general orders of the officer, "commanding the military district, put on the 15th of December last *under* "*strict martial law.*

"2. That by the 3d section of an act of Assembly, approved on the 18th of "December last, all proceedings in any civil case are suspended.

"I. At the close of the argument, on Monday last, we thought it our duty, "lest the smallest delay should countenance the idea that this court entertain "any doubt on the first ground, instantly to declare *viva voce*, (although the "practice is to deliver our opinions in writing,) that the exercise of an au- "thority, vested by law in this court, could not be suspended by any man."

The case of Luther v. Borden, in 7 Howard, is cited on the other side. But what was ruled there? In Rhode Island, in 1842, the Dorr rebellion—as it was called—having broken out, the Legislature passed an act declaring martial law. The power of the State was arrayed against the insurrection, and in the course of military movements which took place, the house of a citizen, an adherent of Dorr, was broken into for the purpose of arresting him. When the controversy ended, as it did very soon, in the total defeat of the Dorr party, this citizen brought his action of trespass for entering his premises against the defendants, who were in the military service of the State.

The Circuit Court, in which the action was brought, gave judgment against him, and the Supreme Court at Washington affirmed this decision, in an opinion delivered by Mr. Chief Justice Taney.

The Court ruled, as had the Courts of the State, that Rhode Island, which had never framed for itself a limited Constitution, held its political power according to the original charter granted by Charles II, in 1663, not altered at the Declaration of Independence, or since, until after th se events, and that the act of 25th June, 1842, by which the Legislature declared that the State was "placed under martial law," being a temporary provision only, was neither contrary to the clause of the Constitution of the United States by which a Republican form of Government is guarantied to each State, nor to the charter of Charles II, and was good and valid.

Having so ruled, they held that the breaking into the Plaintiff's house by the party acting under the military authority of the State was covered by their plea of justification, and the suit could not be maintained.

They held that the question, made by the plaintiff, who were the constituted authorities of the State, the Dorrites having set up a government of their own, which they insisted was the true and legitimate one, was not a judicial question; that the Senators and Representatives under the Charter of Charles II. being admitted to sit in Congress, and the President of the United States, under the act of Congress of 28th of February, 1795, the act to which I have already, more than once, referred, authorizing the President, on application of the Legislature of a State, to suppress insurrection against it, having taken measures to put down the insurgents against the Charter Government, the State authority thus recognized by Congress and the President could not be called in question "in a judicial tribunal;" that the Court

could not go into the question offered to be raised between the Charter and Dorr Governments.

The Court therefore ruled two points, one that under the Rhode Island Charter the State could declare martial law, the other that they could not inquire whether the Dorrites were or were not, the authorities of the State when Congress had already decided the question, and the President was about to march troops in support of their decision. It is on this latter point that the language of the Chief Justice in delivering the opinion of the Court, has been quoted, and most unjustly to that eminent magistrate, as inconsistent with his ruling in Mr. Merryman's case.

"After the President has acted and called out the Militia, is a Circuit "Court of the United States authorized to inquire whether his decision was "right? Could the court, while the parties were actually contending in arms "for the possession of the Government, call witnesses before it and inquire "which party represented a majority of the people? If it could, then it would "become the duty of the Court (provided it came to the conclusion that the "President had decided incorrectly) to discharge those who were arrested or "detained by the troops in the service of the United States or the Government "which the President was endeavoring to maintain. If the Judicial power "extends so far, the guarantee contained in the Constitution of the United "States is a guarantee of anarchy, and not of order.

On the point, when it was pressed on the Court, that Congress was wrong in admitting any but the Dorr Senators and Dorr Representatives to seats in Congress, and the President would be wrong if he marched troops against the Dorr insurgents, the Chief Justice, reasoned to the conclusion that it would be absurd that the Judiciary should review the Legislature and Executive; that, to interfere in the midst of arms and domestic violence, upon a question which of the two Governments was the legitimate one, Congress having Constitutionally, (and this was not denied) passed upon it, and the President being about, Constitutionally, under the authority of Congress (and this was not denied) to support their decision, would be worse than absurd. That the question was a political question, exclusively, and the Judiciary bound by the

measures of Congress and the President. The Chief Justice does not say that the Judiciary could not take cognizance of a question which arose under an unlawful exercise of power by the President, but that Martial Law, being lawfully declared by the Government of the State, the President—Congress having recognized that government—could constitutionally support it against domestic violence with his military power, and that the Supreme Court of the United States was not competent to enquire whether he ought or ought not to use that power. "If the Judicial power extends so far" said he "the guaranty contained in the Con-"stitution is a guaranty of anarchy and not of order."

He does not say that, in using his military force, the President and the officers acting under him, are not amenable to the law. The question of the manner in which it was to be used by him never reached the Court, for the forcible interference of the President never took place, and the trespass committed by the Rhode Island authorities, was justified by their power under the Charter to declare Martial Law.

Not a word of the Chief Justice applies to the President's right to set aside the law when he interferes to suppress an insurrection. Not a word is applicable to such a question. Therefore, not a word which he said is applicable to Mr. Merryman's case or to this; and what has been urged as inconsistent with that case, while it was in the opinion was not in the decision of the Court, and could be omitted from the opinion without affecting either the soundness of the decision or the course of argument by which it was arrived at.

A word more, and I have done. If we dethrone the law because it is imperfect, what shall we put in its place?

The same necessity which authorizes the arrest of a private citizen will warrant the violation of the person of a judge, or of the members of both houses of Congress,

and thus the aborption of the entire power of the State. The difference between Mr. Lincoln's right to pass over the body of Congress to reach his ends, and his right to imprison a bank-teller is nothing but a question of discretion in the use of usurped authority.

Necessity under the Constitution of the United States means that which we decided to be necessary when we agreed upon a Constitution. Our Constitution recognizes State necessity and provides for it in its own way. If it were intended to go further the Constitution would have said so. It would have been written down that while such and such were the laws of peace, or of small wars, and small insurrections, to meet great wars and great insurrections the great law of necessity was still behind, and the President might act accordingly.

And when they wrote it down they would have qualified it as well as they could. They would have endeavored to limit it to time, place, and circumstance. They would have encompassed it with safeguards. They would have affixed penalties to the abuse of it. They would have attempted, if not to control the Executive in the use of his dictatorship, at least to hold him to a severe account when he came to lay it down. They would not, when they were providing for so many contingencies have omitted all security against that of which they must needs have had the most apprehension.

If those great men who framed the Constitution could for one instant have admitted to their souls the thought, harbored by the two politicians who put their names to this proclamation, that there was this "higher law" of necessity, that the work to which they had given so much patriotic labor, existed but at Executive pleasure and could be puffed away "as a necessary measure" to secure militia drafts, and enlistments—that to prevent "disloyal practices," "martial law," and "forts, camps, arsenals, military prisons and other places of confinement by military authority,"

were to push aside the Constitution,—if Washington and his compeers—as wise as Mr. Lincoln and his Cabinet—had understood all this, and tasked their wits to put the *necessary* part of our laws on paper, what could they have written down for us? Why nothing! Everybody knows what the law is, and everybody knows what it is to be without any, but nobody what this other thing is which is neither law nor the absence of law. Nobody has told us when this thing prevails, what our rights are, how our wrongs are to be redressed, what would be our Constitutional *status*, what the condition of the citizen who lives under it.

The difference between modern light and liberty and the condition of the world as it used to be is made by the law, which has expelled necessity. We profess to have established a system which anticipates public wants, provides for them, and must be obeyed. All the magistrate has to do is to follow it and originate nothing.

We have a written Constitution—and that is an American peculiarity—which only the people can change. This may have its inconveniences, but it serves to show how determined were our ancestors to clear themselves of the law of necessity. If the three branches of the Government of the Union, and every State establishment should unite in the opinion that it was absolutely necessary to do something outside of the Constitution, they could not effect it. They must abide by the law.

When an act of Congress comes before the Judiciary, on the question of its according with the Constitution, the Court looks to that instrument, and if the power which has been exercised is not found to have been there bestowed as a Legislative function, the act is declared void. It falls to the ground. The citizen is not bound by it, he sets it at naught. Nobody ever heard of a Judge asking himself the question whether an act not warranted by the terms of the Constitution ought not to hold good, because

it was necessary. No Judge ever gave utterance to such a sentiment. The suggestion—which has brought our country to the very brink of ruin—that there was a higher law than the Constitution was a great political mistake which has stuck to the author of it like the poisoned shirt.

The present ills of the State are the evidence of it. Should they prove fatal and all our hopes—our vain hopes and vainer boastings—end here, let posterity over the grave of the Republic write for our epitaph these words—THESE MEN LOST THEIR LIBERTIES WHEN THEY FOUND A LAW HIGHER THAN THE CONSTITUTION !